XXXX XXXX,	* **BEFORE SUSAN A. SINROD,**
STUDENT,	* **AN ADMINISTRATIVE LAW JUDGE**
V.	* **OF THE MARYLAND OFFICE**
	* **OF ADMINISTRATIVE HEARINGS**
WICOMICO COUNTY PUBLIC	* **OAH NO.: MSDE-WICO-OT-12-43750**
SCHOOLS	

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RULING ON PARENT'S MOTION FOR SUMMARY DECISION AND WCPS' MOTION FOR JUDGMENT

STATEMENT OF THE CASE

On November 7, 2012, XXXX XXXX, (Parent), on behalf of her child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Wicomico County Public Schools (WCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I conducted a telephone prehearing conference on December 13, 2012. The Parent participated and represented herself. Manisha Kavadi, Esq., represented the WCPS. By agreement of the parties, the hearing was scheduled for January 16, 17, 23 and 24, 2013.

On January 15, 2013, late in the afternoon on the day prior to the first day of hearing, the Parent filed a Motion for Summary Decision with the OAH. On January 16, 2013, I convened

the hearing as scheduled at the WCPS building, 101 Long Street, Salisbury, Maryland. Ms. Kavadi appeared on behalf of the WCPS and the Parent and the Student appeared on the Student's behalf.[1] Not having had an opportunity to consider the Motion for Summary Decision prior to the hearing, I explained to the parties that I would convene the hearing, and I would allow for oral argument on the Motion for Summary Decision on the second day of hearing, January 17, 2013.

On January 17, 2013, the Parent presented the testimony of her final two witnesses and then rested her case. At that point, I heard argument from both parties on the Parent's Motion for Summary Decision. Thereafter, Ms. Kavadi moved for judgment against the Parent, arguing that the Parent failed to meet her burden of establishing the allegations in her Due Process Complaint. The Parent presented her oral argument in opposition to the Motion for Judgment. I determined that it was necessary to adjourn the hearing at that point so that I could consider both motions. By virtue of my decision herein, I canceled the final two days of hearing.

The hearing dates requested by the parties fell more than 45 days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2010). Due to the Christmas and New Year's holidays and the parties' respective schedules as a result of the holidays, the parties requested an extension of time until thirty days after the conclusion of the hearing for me to issue a decision. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008). Therefore, since the hearing adjourned on January 17, 2013, my decision is due on February 16, 2013.

[1] The Student's father, XXXX XXXX, was present at the hearing pursuant to a subpoena requested by the WCPS. Mr. XXXX and the Parent are divorced, and the Parent was the sole filer of the Due Process Complaint.

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) (2009); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. 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) Should the Parent's Motion for Summary Decision be granted?

2) If not, should the WCPS' Motion for Judgment be granted?

SUMMARY OF THE EVIDENCE

Exhibits

The Parent submitted the following attachments to her Motion for Summary Decision:[2]

1) Letter from XXXX XXXX, M.D. to XXXX XXXX, dated January 12, 2011

2) Prior Written Notice regarding Individualized Education Program (IEP) meeting on December 20, 2011, undated

3) Letter from the Parent to Dr. XXXX XXXX and XXXX XXXX, dated December 28, 2011

4) Letter from XXXX XXXX, Director of Special Education, WCPS to the Parent, dated January 11, 2012

5) Request for Mediation and Due Process Complaint, undated
6) ED Physician Discharge Summary, XXXX Medical Center, dated March 5, 2012

[2] The WCPS objected to the documents that were attached to the Motion for Summary Decision, because they were not presented to the WCPS pursuant to the standard five-day disclosure rule set forth in 34 C.F.R. § 300.512. Although I did not specifically rule on that objection during the hearing, I am overruling that objection and considering the documents attached to the Motion for Summary Decision, as each attached document was necessarily part of the Student's records with the WCPS.

7) Letter from XXXX XXXX, Ph.D. to XXXX XXXX, Child Protective Services, dated March 13, 2012

8) Letter from XXXX XXXX, Esquire to XXXX XXXX, Principal, [School 1], dated March 22, 2012

9) Application for Home/Hospital Teaching Services, dated March 22, 2012

10) Memorandum from XXXX XXXX, Supervisor, Home/Hospital, WCPS to Dr. XXXX XXXX, Principal, [School 1], dated April 16, 2012

11) Wraparound Maryland Referral, dated March 25, 2012

12) Letter from Ms. Kavadi to the OAH, dated April 4, 2012

13) There was no exhibit number 13

14) Letter from Ms. Kavadi to XXXX XXXX, Esquire and XXXX XXXX, dated April 4, 2012

15) Letter from the OAH to XXXX XXXX and the Parent, dated April 17, 2012

16) Letter from XXXX XXXX, M.D. addressed "To Whom It May Concern," dated May 11, 2012

17) 504 Minutes, dated May 24, 2012

18) Letter from Michael J. Eig, Esquire to Dr. XXXX XXXX, Principal, [School 1], dated August 15, 2012

19) Letter from Michael J. Eig, Esquire to Dr. XXXX XXXX, Principal, [School 1], dated August 16, 2012

20) Report of Occupational Therapy Evaluation conducted by XXXX XXXX, Ph.D., dated April 15, 2012

21) Report of Language Processing Evaluation conducted by XXXX XXXX, Ph.D, dated April 28, 2012

22) Letter from XXXX XXXX, Esquire to Ms. Kavadi, dated October 24, 2012

23) Report of Neuropsychological Evaluation, dated May 30 and May 31, 2012

24) Email from Ms. Kavadi to XXXX XXXX and XXXX XXXX, with copies to other recipients, dated October 25, 2012

25) Email chain between XXXX XXXX, to Ms. Kavadi, XXXX XXXX, Michael Eig, the Parent and XXXX XXXX, dated October 31, 2012 and November 1, 2012

26) Memorandum from XXXX XXXX to XXXX Staff regarding November IEPs, dated November 7, 2012

27) Email from the Parent to XXXX XXXX, with copy to Ms. Kavadi, dated November 5, 2012, with Invoice from XXXX Group attached

28) Request for Mediation and Due Process Complaint, dated November 7, 2012

29) Report Card from [School 2], Mid Term Quarter 2, School year 2012-2013

The Parent submitted the following exhibit during the hearing, which was admitted into evidence:[3]

Parent Ex. #1- Email chain between Ms. Kavadi, XXXX XXXX and XXXX XXXX, with copies to other recipients, dated March 26, 2012

The WCPS submitted the following exhibits, which were admitted into evidence:

WCPS Ex. #19- Letter from XXXX XXXX, Esquire to Susan A. Sinrod, Administrative Law Judge, dated March 29, 2012, with Notice of Hearing dated March 12, 2012 attached

WCPS Ex. #22- Email chain between Ms. Kavadi, XXXX XXXX, the Parent and XXXX XXXX, with copies to other recipients, dated March 25 and 26, 2012

WCPS Ex. #23- Letter from Ms. Kavadi to XXXX XXXX, Esquire and XXXX XXXX, dated April 4, 2012

[3] The Parent apparently intended to submit additional documents for admission into evidence. However, she conceded that she did not forward them to counsel for the WCPS at least five days prior to the hearing as required. She also stated that she thought she could rely on the WCPS documents, to which the WCPS objected. Regardless, when I adjourned to consider the motions, the WCPS had only moved some of its exhibits into evidence, and the Parent had not moved any additional exhibits into evidence. Therefore, I was not asked to rule on the admission of any additional exhibits on behalf of either party.

WCPS Ex. #24- Email chain between Ms. Kavadi, XXXX XXXX and XXXX XXXX, with copies to other recipients, dated April 5, April 9, April 12, April 16 and April 17, 2012

WCPS Ex. #25- Email chain between Ms. Kavadi and XXXX XXXX, with copies to other recipients, dated April 25, 2012

WCPS Ex. #26- Email chain between Ms. Kavadi, XXXX XXXX and XXXX XXXX, with copies to other recipients, dated April 27, 2012

WCPS Ex. #27- Letter from XXXX XXXX, M.D. addressed "To Whom It May Concern," dated May 11, 2012

WCPS Ex. #28- Email from Ms. Kavadi to XXXX XXXX, XXXX XXXX and XXXX XXXX, with copies to other recipients, dated May 11, 2012

WCPS Ex. #29- Email from XXXX XXXX to the Parent and XXXX XXXX,[4] with copies to other recipients, dated May 14, 2012, with Invitation dated May 14, 2012 attached

WCPS Ex. #30- Letter from XXXX XXXX, Esquire to XXXX XXXX, Principal, [School 1], dated May 14, 2012

WCPS Ex. #31- Email chain between Ms. Kavadi, XXXX XXXX, XXXX XXXX, XXXX XXXX and XXXX XXXX, dated May 14 and 15, 2012

WCPS Ex. #32- Email chain between the Parent, Ms. Kavadi, XXXX XXXX and XXXX XXXX, dated May 22, 2012

WCPS Ex. #33- Notification of 504/ADA Meeting, dated May 17, 2012

WCPS Ex. #34- Email from XXXX XXXX to XXXX XXXX and XXXX XXXX, with copies to other recipients, dated May 17, 2012

WCPS Ex. #37- Letter from Michael J. Eig, Esquire to Dr. XXXX XXXX, Principal, [School 1], dated August 15, 2012

WCPS Ex. #38- Letter from Michael J. Eig, Esquire to Dr. XXXX XXXX, Principal, [School 1], dated August 16, 2012

WCPS Ex. #46- Letter from Michael J. Eig, Esquire to Ms. Kavadi, dated September 4, 2012

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[4] This email chain only shows Mr. XXXX's email address, XXXX, but I was able to determine that this was, in fact, Mr. XXXX's email address through other email chains which were admitted into evidence.

WCPS Ex. #47-	Email from Ms. Kavadi to Michael Eig and XXXX XXXX, dated September 17, 2012
WCPS Ex. #48-	Email chain between Ms. Kavadi, XXXX XXXX, XXXX XXXX and XXXX XXXX, dated September 17, 18, 25 and 28, 2012
WCPS Ex. #49-	Email from Ms. Kavadi to XXXX XXXX and XXXX XXXX, with copies to other recipients, dated October 3, 2012
WCPS Ex. #50-	Letter from XXXX XXXX, Esquire to Ms. Kavadi, dated October 23, 2012
WCPS Ex. #52-	Letter from XXXX XXXX, Esquire to Ms. Kavadi, dated October 24, 2012
WCPS Ex. #53-	Email chain between Ms. Kavadi, XXXX XXXX and XXXX XXXX, with copies to other recipients, dated October 24 and 25, 2012
WCPS Ex. #54-	Email chain between XXXX XXXX, Ms. Kavadi and XXXX XXXX, with copies to other recipients, dated October 25, 2012
WCPS Ex. #55-	Email chain between XXXX XXXX, Ms. Kavadi, XXXX XXXX and the Parent, with copies to other recipients, dated October 24, 25, 26 and 31, 2012
WCPS Ex. #56-	Email chain between Ms. Kavadi, XXXX XXXX, XXXX XXXX and the Parent, with copies to other recipients, dated October 24, 25, 26 and 31, 2012
WCPS Ex. #57-	Email chain between XXXX XXXX, Ms. Kavadi, XXXX XXXX, Michael Eig, the Parent, XXXX XXXX, XXXX XXXX and XXXX XXXX, dated October 24, 25, 26, 31, 2012 and November 1 and 5, 2012
WCPS Ex. #62-	Report Card, [School 1], dated February 28, 2012
WCPS Ex. #73-	504 Minutes, dated May 24, 2012
WCPS Ex. #74-	Email from XXXX XXXX to XXXX XXXX, XXXX XXXX and XXXX XXXX, dated February 9, 2012
WCPS Ex. #95-	Two emails from XXXX XXXX to the Parent and XXXX XXXX, undated, with copies to other recipients

Testimony

The Parent testified and presented the testimony of the following witnesses:

1. XXXX XXXX, School Psychologist, WCPS
2. The Student
3. XXXX XXXX, Esquire, Guardian Ad Litem for the Student, who testified by telephone

The WCPS did not present any testimony, because I concluded the hearing on January 17, 2013 to consider the Parent's Motion for Summary Decision and the WCPS' Motion for Judgment.

UNDISPUTED FACTS

After considering the Parent's Motion for Summary Decision, and the WCPS argument in opposition, I conclude that the following material facts are undisputed:

1. The Student was born on XXXX, 2003 and resides in Maryland.
2. The Student was receiving special education services from the WCPS while attending the [School 1] ([School 1]) until December 20, 2011.
3. On December 20, 2011, at an IEP meeting, the IEP team determined that the Student no longer required special education services.
4. On December 28, 2011, the Parent requested, in writing, that the WCPS provide an Independent Educational Evaluation (IEE) of the Student at public expense, because she claimed that the WCPS evaluation, upon which the WCPS determined that the Student no longer qualified for special education services, was inadequate.

5. On January 17, 2012, the WCPS filed a Due Process Complaint, in opposition to the Parent's request for an IEE at public expense.

6. On March 5, 2012, the Student expressed XXXX, and the Parent took him to the emergency room at XXXX Medical Center. He was discharged that same day.

7. On March 13, 2012, Dr. XXXX XXXX, psychologist, conducted an emergency interview with the Student and rendered a diagnosis of XXXX, severe, with XXXX and a secondary diagnosis of XXXX.

8. On or around March 22, 2012, the Parent applied for Home/Hospital teaching services for the Student.

9. On March 22, 2012, XXXX XXXX, Esquire, the Parent's attorney, wrote a letter to XXXX XXXX, the Principal of [School 1]. In that letter, Ms. XXXX noted that due to the recent events concerning the Student, including his diagnosis of severe XXXX with XXXX, the Parent was requesting that a new IEP be developed, and that a transition plan be implemented for the Student's to school from home/hospital instruction.

10. On April 4, 2012, the WCPS sent a letter to Ms. XXXX and Mr. XXXX, offering April 25, 2012 at 1:00 p.m. for an IEP meeting to discuss the Student's

11. new diagnosis.[5]

12. On April 9, 2012, Mr. XXXX informed the WCPS and the Parent's attorney that

[5] I have concluded that the facts regarding the scheduling of the IEP meeting were undisputed, because the Parent conceded that the letters and emails that the WCPS submitted into evidence regarding the scheduling were authentic and valid. The Parent disputed the manner in which certain dates were offered for the meeting and the options given for convening or postponing scheduled meeting dates, but she did not dispute the fact that the meeting dates were offered, scheduled and postponed.

he was unavailable to attend an IEP meeting on April 25, 2012. In response, the WCPS offered May 2, 2012 at 11:00 a.m. or May 4, 2012 at 11:00 a.m. as alternate dates. Ultimately the parties agreed upon May 24, 2012 at 10:00 a.m. for the IEP meeting.

13. The WCPS accepted the Student for home/hospital instruction, beginning April 10, 2012, due to his emotional condition.

14. On May 11, 2012, the WCPS informed the Parent's attorney and Mr. XXXX that the May 24, 2012 IEP meeting was still scheduled to go forward and any documentation that either parent wanted the IEP team to review must be received by the WCPS five days prior to the meeting.

15. On May 22, 2012, the Parent informed the WCPS that the neuropsychological assessment report would not be ready in time for the May 24, 2012 IEP meeting. Further, the Parent informed the WCPS that the Student's educational advocate was not available on May 24, 2012 and she did not want to proceed with the IEP meeting without him. She requested that the meeting be rescheduled for a date after June 1, 2012.

16. In response, also on May 22, 2012, the WCPS, noting that the IEP meeting had been scheduled six weeks prior, informed the Parent that she could withdraw her request for an IEP meeting; otherwise the meeting would not be postponed and would proceed as scheduled.

17. On May 22, 2012, the Parent withdrew her original request for an IEP meeting.

18. On August 15, 2012, Michael J. Eig, newly retained counsel for the Parent and the Student, requested an IEP meeting for the review of several independent

evaluations of the Student, including an occupational therapy (OT) evaluation, a speech/language (S/L) evaluation, and the neuropsychological evaluation. Both the OT and the S/L evaluations were attached to his letter of August 15, 2012. The letter represented that the neuropsychological evaluation was not yet finished but would be forwarded to the WCPS when completed.

19. After some correspondence transpired between Ms. Kavadi and Mr. Eig, on September 17, 2012, the WCPS offered October 8, 2012 at 10:00 a.m., October 17, 2012 at 10:00 a.m., and October 18, 2012 at 1:00 p.m. for an IEP meeting to be held.

20. On September 18, 2012, the parties confirmed October 18, 2012 at 1:00 p.m. for the IEP meeting.

21. On September 25, 2012, Mr. Eig's office informed Ms. Kavadi that the Student's educational advocate could not attend the October 18, 2012 IEP meeting, and requested that it be rescheduled. On September 28, 2012, Mr. Eig's office proposed October 16, 2012 at 10:00 a.m. or October 29, 2012 at 1:00 p.m.

22. On October 3, 2012, the WCPS confirmed October 29, 2012 at 1:00 p.m. for the IEP meeting.

23. On October 24, 2012, Mr. Eig forwarded the neuropsychological report to the WCPS. In his letter, he asked Ms. Kavadi to confirm whether there was sufficient time allotted for the neuropsychological report to be reviewed and discussed at the October 29, 2012 meeting.

24. On October 25, 2012, Ms. Kavadi informed Mr. Eig's office that there was not sufficient time for the IEP team to review the 17 page neuropsychological report

before the October 29, 2012 meeting. Ms. Kavadi informed Mr. Eig's office that a second meeting would be required to review the neuropsychological report, or the October 29, 2012 meeting could be postponed so that all of the evaluations could be reviewed together.

25. On October 25, 2012, Mr. Eig's office informed Ms. Kavadi that they would like to postpone the October 29, 2012 meeting, and proposed November 13, 2012 or November 14, 2012 for the IEP meeting. On October 26, 2012, Ms. Kavadi informed Mr. Eig's office that the dates of November 13 and 14, 2012 were not available because of American Education Week, but proposed November 9, 2012 or November 27, 2012.

26. On October 26, 2012, Mr. XXXX informed Ms. Kavadi that he could not attend a meeting on November 9, 2012, but could attend on November 27, 2012.

27. On November 1, 2012, Mr. Eig's office informed Ms. Kavadi that November 27, 2012 was too far away to schedule the IEP meeting, and asked if an earlier date was available. Ms. Kavadi responded that November 27, 2012 was the earliest date available due to American Education Week and the Thanksgiving holiday.

28. On November 5, 2012, Mr. Eig's office informed Ms. Kavadi that there was no need to reschedule the IEP meeting, because the Student would no longer be attending school in Wicomico County.

ADDITIONAL FINDINGS OF FACT

After considering the evidence presented, I find the following additional facts by a preponderance of the evidence:

1. On December 20, 2011, the Parent brought the Student to the IEP meeting. Mr. XXXX did not know that the Student was going to be there, and, upon seeing the Student, Mr. XXXX voiced his objection to the Student's attendance, given that sensitive matters about the Student were going to be discussed. An argument ensued between Mr. XXXX and the Parent, and the Student became upset and started to cry.
2. Thereafter, the Student's teacher took the Student by the arm and escorted him out of the meeting room so that he would not be exposed to the stressful situation.
3. At that meeting, the IEP team discussed a psychological evaluation conducted by XXXX XXXX, School Psychologist. Ms. XXXX considered a wide variety of data, including the Student's records from 2006-2011, classroom observations, assessments, information obtained from both parents, and other data collected during the period of evaluation.
4. At the time of the December 20, 2011 IEP meeting, the Student no longer required specialized instruction. He had achieved the goals and objectives of his IEP. Although he experienced some anxiety in school, he was able to deal with that anxiety by taking breaks, and he was easily redirected back to task.

STIPULATED FACT

The parties stipulated to the following fact:

1. The WCPS scheduled an IEP meeting after receiving new information from the Parent in March 2012 regarding the possibility that the Student was suffering from XXXX.

DISCUSSION

The process of identification, assessment, and educational placement of students with disabilities is governed by the following federal and state laws and regulations: The IDEA, 20 U.S.C.A. §§ 1400-1482 (2010), 34 C.F.R. Part 300 (2010), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012) and COMAR 13A.05.01.[6] The IDEA provides that all children with disabilities have the right to a "free appropriate public education" (FAPE). 20 U.S.C.A. § 1412.

Title 20, Section 1401(9) of the United States Code defines FAPE:

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

20 U.S.C.A. § 1401(9). *See also* 34 C.F.R. § 300.17 (defining FAPE similarly); Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction.

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[6] From this point forward, any references to: 20 U.S.C.A. §§ 1400-1487 are to those in the 2010 volume; to 34 C.F.R. Part 300 are to those in the 2010 volume; to Md. Code Ann., Educ. §§ 8-401 through 8-417 are to those in either the 2008 volume and/or the 2012 supplement.

Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court explained 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.

Rowley, 458 U.S. at 200-201.

Federal courts in this circuit have applied the principles articulated in *Rowley.* A student is not entitled to "[t]he best education, public or non-public, that money can buy" or "all services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983). Rather, the issue is whether the IEP is reasonably calculated to enable the child to receive educational benefit, as demonstrated by such measures as passing marks and advancing from grade to grade. *Rowley,* 458 U.S. at 203-04.

Thus, the issue is not whether the IEP will enable the student to maximize his or her potential. The IDEA provides a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). It does not establish a "requirement to guarantee any particular outcome for the child." *King v. Bd. of Educ. of Allegany County*, 999 F. Supp. 750, 767 (D. Md. 1998). The Fourth Circuit has explained that the IDEA does not require local education agencies to "furnish[] every special service necessary to maximize each handicapped child's potential." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

The question of whether a student is receiving a FAPE has a procedural and a substantive component. 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. The Supreme Court noted that the first inquiry is whether a school district complied with the procedures set forth in IDEA. The second inquiry is whether the IEP, developed through the IDEA's procedures, was reasonably calculated to enable a student with disabilities to receive appropriate educational benefit. *Rowley,* 458 U.S. at 206-07.

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). Accordingly, the Parent in this case bears the burden of proof.

Parent's Motion for Summary Decision

COMAR 13A.05.01.15C(12) requires that due process hearings be conducted in accordance with COMAR 28.02.01, the Rules of Procedure of the OAH. The OAH Rules of Procedure permit an administrative law judge to grant summary decision if the judge finds that "(a) [t]here is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law." COMAR 28.02.01.12D(4). This regulation is substantially similar to both Maryland Rule 2-501 and Rule 56 of the Federal Rules of Civil Procedure. Therefore, it is appropriate to refer to interpretations of each for guidance in the application of the proper standard. *See Commodity Futures Trading Commission v. Noble Wealth Data Information Services, Inc.*, 90 F. Supp. 2d 676, 684 (D. Md. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

An opposing party "may not rely merely on allegations or denials in its own pleading," Fed. R. Civ. P. 56(e), but must come forward with "specific facts showing that there is a genuine issue for trial." *Commodity Futures Trading*, 90 F. Supp. 2d at 685 *(citing Matsushita Electronic Indus. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)). "Mere unsupported speculation . . . is

not enough to defeat a summary judgment motion." *Ennis v. Nat' l Ass'n of Bus. & Educational Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) (amended March 14, 2008).

Facts are material if they would affect the outcome of a case; there is a genuine issue of fact if the evidence would allow a "reasonable [fact finder to] . . . return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. A mere scintilla of evidence in favor of a nonmoving party is insufficient to defeat a summary judgment motion. *Id.* at 251. In deciding a motion for summary judgment, or summary decision, the evidence, including all inferences therefrom, is viewed in the light most favorable to the non-moving party. *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 62 (1984).

To defeat a motion for summary decision, a defendant is required to raise a genuine dispute as to at least one material fact and the purpose of the administrative hearing is to resolve the disputed facts. If no material facts are genuinely disputed, no hearing is required. COMAR 28.02.01.12D.

In her Motion for Summary Decision, the Parent argued that the WCPS failed to follow procedural and substantive requirements of the IDEA. She alleged that she was denied meaningful participation at the IEP meeting of December 20, 2011, because, over her objection, the IEP team determined that the Student no longer qualified for special education services. Further, she claimed that she was denied participation because, despite her request for a new IEP meeting because of the Student's new diagnosis, no IEP meeting was ever held. Additionally, she argued that the WCPS violated COMAR 13A.05.01.04, because it did not complete an evaluation of the Student within 90 days of her attorney's March 22, 2012 written referral. The Parent set forth 32 facts which she claimed were material and undisputed, therefore entitling her to summary decision as a matter of law.

The WCPS argued that there were significant material facts in dispute.[7] It disputed that after the WCPS released the Student from special education services in December 2011, the Student's grades declined and so did his attitude toward learning. It pointed to the report card that the WCPS moved into evidence during the Parent's case, dated February 28, 2012, which showed that in all of his courses, he either maintained or improved his grade (all As and Bs), with the exception of Science, which went from an A to a B. WCPS Ex. #62. The teacher's comments on the report card were very complimentary, including that the Student "is working above grade level," "[g]reat job...," the Student "is always enthusiastic about sharing what he knows," and he is "always prepared for class." WCPS Ex. #62. Additionally, the WCPS noted that at the 504 meeting on May 24, 2012, the team reviewed the Student's academic performance since his special education services ceased, prior to the time that he was placed on home/hospital instruction, and his benchmarks in reading were at and above expectation, and his math benchmarks were above expectation. WCPS Ex. #63. Therefore, the WCPS argued that the Student did not exhibit any academic deterioration, and therefore, disputed that his academic performance declined.

Additionally, the WCPS disputed that it was at fault for the delay in scheduling the IEP meeting to review the Student's current diagnosis and independent evaluations. The WCPS asserted that it followed all procedures and was ready to proceed each time an IEP meeting was scheduled. According to the WCPS, each time an IEP meeting was scheduled, it was cancelled or rescheduled at the Parent or Mr. XXXX's request, and the WCPS always immediately offered

[7] Since the Motion for Summary Decision was filed with no time for the WCPS to respond, I considered the evidence that the WCPS submitted during the Parent's case to support the WCPS response to the Motion for Summary Decision.

dates to reschedule the meeting. The WCPS submitted email chains that were admitted into evidence, which did in fact establish that on four occasions, the Parent was either not prepared with all of the evaluations that it wanted the WCPS to consider, or she or Mr. XXXX needed to postpone due to someone's lack of availability. WCPS Exs. #23, 24, 28, 29, 32, 37, 47, 48, 49, 50, 52, 53, 54, 55, 56. 57.

The Parent cited *Letter to Koscielniak,* December 19, 2011 a letter of interpretation from the Office of Special Education Programs (OSEP), in support of her argument that the WCPS erred in failing to schedule an IEP meeting at the Parent's request after the Student had been dismissed from special education services. As argued by the WCPS, this letter is inapplicable and distinguishable from this case. In the *Letter to Koscielniak*, the OSEP opined that it is improper for a service provider to categorically dismiss a student from special education services. Instead, the determination to dismiss a student must be made by the IEP team, with respect to the student's individual goals and objectives. The OSEP also said that if a parent disagrees with the IEP team's determination to discontinue special education services, he/she can request a new IEP team meeting to discuss the decision. In this case, there was no contention that the Student's dismissal from special education services was categorical. Further, the facts presented by the WCPS established that the WCPS did make significant attempts to schedule an IEP meeting when requested by the Parent.

The Parent also alleged that the WCPS violated the child find requirements of the IDEA, by failing to hold an IEP meeting upon receiving information that the Student has a suspected disability. The WCPS argued that the child find requirements apply to children who have not yet been identified as students with a disability. Since the Student had been receiving special

education services through December 20, 2011, the WCPS argued that its obligation was to evaluate him every three years.

20 U.S.C. section 1412(3)(A) states:

> (3) Child find.
> (A) In general. All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

See also, 34 C.F.R. § 300.111.

The Parent also contended that the WCPS violated the requirement set forth in COMAR 13A.05.01.06 that a student with a suspected disability be evaluated within 90 days of a referral regarding that student. COMAR 13A.05.01.06A states:

> **.06 Evaluation, Reevaluation, and Eligibility.**
>
> A. Initial Evaluation.
>
> (1) An IEP team shall complete an initial evaluation of a student, consistent with 34 CFR §300.301(c)(1), within:
>
> (a) 60 days of parental consent for assessments in accordance with Regulation.13A of this chapter; and
>
> (b) 90 days of the public agency receiving a written referral in accordance with Regulation .04A of this chapter.[8]

The WCPS argued that child find applies to a Student who has not yet been identified as a student with a disability, and the 90 day requirement applies to an initial evaluation of a student. The WCPS further asserted that it immediately attempted to schedule an IEP meeting to

[8] There are exceptions to this 90-day requirement contained in COMAR 13A.05.01.06A(2) which are not applicable to this case.

address any new diagnosis, but an evaluation could not occur until the IEP team met to review and discuss the Student's current status, and determine what type of evaluations were necessary.

The WCPS maintained that the non-occurrence of the IEP meeting was not the fault of the WCPS. I agree with the WCPS. Even given the facts set forth above which the WCPS has not disputed, the Parent is not entitled to judgment as a matter of law. The Student was identified, located and evaluated, and received special education services for several years. After an educational evaluation in the Fall of 2011, the IEP team determined that he was no longer eligible for special education services. COMAR 13A.05.01.06A is patently relevant to an initial evaluation of a student with a suspected disability. Contrarily, the Student had already been initially evaluated, and was most recently reevaluated in the Fall of 2011. The IEP team thereafter dismissed him from special education services. 34 C.F.R. section 300.303(b)(1) provides that a student may not be reevaluated more than once per year unless the parties agree otherwise. An IEP meeting was necessarily required to pursue that reevaluation. The undisputed facts established that, upon receipt of the information that the Student was suspected to have a new disability, the WCPS proceeded to attempt to schedule an IEP meeting, and on at least four occasions, that meeting was canceled by the Parent, Mr. XXXX, or counsel for the Parent.

The last argument in the Parent's Motion for Summary Decision cited case law and regulations that address the school board's responsibility to ensure that there is an IEP in place at the beginning of the school year, and failure to do so violates the IDEA and deprives the school board of the ability to provide a FAPE. *See generally, Gerstmyer v. Howard County Public Schools,* 850 F. Supp. 361 (D. Md.1994); *Justin G. v. Board of Ed. Montgomery County,* 148 F. Supp. 2d. 576 (D. Md. 2001). The matter herein is distinguished from that line of cases. The undisputed facts established that the Student was dismissed from special education services in

December 2011. After receiving subsequent information that the Student may have a new diagnosis indicating an educational disability, the WCPS attempted to schedule an IEP meeting on multiple occasions, only to be canceled by the Parent or Mr. XXXX. Viewing the undisputed facts in the light most favorable to the WCPS, who is the non-moving party, the non-occurrence of the IEP meeting to review evaluations and determine if the Student was again eligible for special education services was not the fault of the WCPS.

I have addressed the facts that I have found to be undisputed by virtue of the argument and evidence presented by both parties, and the material facts that the WCPS established *are* disputed. The remaining facts in the Motion for Summary Decision either are not facts at all, or are not relevant to the issues to be decided in my ruling on the Motion for Summary Decision.[9] Only facts that speak directly to the issues presented by the Motion for Summary Decision are material or relevant. Therefore, I find that it is unnecessary to address each one of those additional facts separately.

Based on my analysis herein, I conclude that the WCPS successfully rebutted the Parent's Motion for Summary Decision by presenting evidence of material facts in dispute. Further, even given the facts that are not in dispute, the Parent is not entitled to Summary Decision as a matter of law. Therefore, the Motion for Summary Decision will be denied.

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[9] For example, fact number 19 begins, "[s]everal roles exist for the pediatrician under the IDEA including referrals, open communication regarding assessments, and participation in the creation of an IEP/504. This appears to be argument, not fact. Fact number 20 discusses a 504 meeting, which is irrelevant to the issues in this case. Fact numbers 23, 24, and 26 sets forth the recommendations contained in the OT, S/L and neuropsychological evaluations. The issue framed the Motion For Summary Decision is whether the WCPS caused procedural errors in the alleged failure to evaluate the Student with in 90 days, or failures that violate child find, not the content of those evaluations.

WCPS Motion for Judgment

At the end of the Parent's case, the WCPS moved for judgment, arguing that the Parent's evidence was insufficient to meet her burden of establishing the issues framed in the Due Process Complaint. The Parent presented oral argument in response to the motion, maintaining that the WCPS did not follow the procedures that the IDEA mandates.

COMAR 28.02.01.12E governs motions for judgment:

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 OAH regulation on motions for judgment is virtually identical to Md. Rule 3-519 (Motion for Judgment in the District Court) and Md. Rule 2-519 (Motion for Judgment in the Circuit Court, as that rule applies to bench trials). Discussion about these court rules is applicable by analogy. The rules permit a judge in a bench trial to decide such a matter on the sufficiency of the evidence or to find facts at the end of a plaintiff's case. In this case, an Administrative Law Judge (ALJ) can properly grant the motion if the party with the burden of proof presents insufficient evidence to meet that burden. For the Parent's case to survive the WCPS Motion for Judgment, I must be able to conclude that she offered some competent and

probative evidence to establish, at a minimum, the issues set forth in her Due Process Complaint. I will address each issue.

First, the Due Process Complaint claimed that the WCPS relied on "destroyed data to demonstrate the meeting of goals and objectives in [the Student's] 2011 Speech and Communication/Social Skills." There was no testimony or documentary evidence in the record before me pertaining to this issue. I conclude that the Parent did not meet her burden of establishing this allegation.

Next, the Due Process Complaint alleged that the WCPS failed in its child-find duties, because it did not timely evaluate and provide an IEP for the Student. The allegation states further that the WCPS improperly failed to identify the Student as a Student in need of specialized instruction, and failed to appropriately determine the Student's need for special education.

The Parent presented the testimony of XXXX XXXX, School Psychologist, WCPS. Ms. XXXX conducted the psychological evaluation of the Student in the fall of 2011. Ms. XXXX testified that she considered a wide variety of data, including the Student's records from 2006-2011, and she considered the information that she received from the November 2011 IEP meeting. She considered class observations, assessments, information obtained from both parents and other data collected during the period of evaluation. Ms. XXXX explained that the Student was originally identified as XXXX, with diagnoses of XXXX disorder and XXXX disorder.

Ms. XXXX noted that at the time of her evaluation, the Student was not showing distress in school, and he was doing well socially. Although he experienced episodes of anxiety, it did not rise to the level that would necessitate specialized instruction or impede his progress in the

general curriculum. His teacher, Ms. XXXX, told her that when the Student experienced anxiety, he could easily be returned to task. Ms. XXXX administered the WISC IV test, where, in 2006 he scored at the upper end of the average range, and in 2011, his scores were slightly lower. However, Ms. XXXX believed that the most recent WISC IV was much more indicative of his current IQ, as opposed to the 2006 test when he was in the third grade, since the IQ normally stabilizes when a child is in third grade. Still, according to Ms. XXXX, his scores were in the average range. Ms XXXX testified that she was looking for any impact that the Student's XXXXX was having on his social, behavioral and academic functioning in school; however, there was no indication that XXXX was currently impacting his performance. Ms. XXXX explained the he can still receive accommodations to deal with anxiety, such as taking breaks and preferential seating, without the necessity of an IEP or specialized instruction.

Ms. XXXX testified that she opined to the IEP team that the Student had improved to the point where he no longer required specialized instruction. However, she testified that it was an IEP team decision to terminate his IEP. Ms. XXXX explained that where there is a request for new assessments and evaluations after a student is dismissed from specialized instruction, the IEP team must convene a meeting and determine as a team, what, if any, additional evaluations are necessary.

I found Ms. XXXX' testimony to be very credible. She identified the wide variety of data that she considered in her psychological evaluation. The evaluation was not presented for admission into evidence. The IEP team concluded that the Student had achieved the annual goals and objectives in his IEP, and his grades were good. Ms. XXXX was called as the Parent's witness, and her testimony was convincing that her assessment and the IEP team's determination were correct given the information available to the IEP team at that time.

Regarding the allegation that the IEP team failed to identify the Student as being in need of specialized instruction after it received information of a newly suspected disability, I have already concluded that the only evidence before me established that the WCPS acted appropriately and followed required procedures after receiving written information from the Parent's attorney in March 2012 of a newly suspected disability, and after having knowledge that the Student was on home/hospital instruction. The Parent implied in her testimony that the WCPS' inability to review the neuropsychological evaluation in the four days prior to the October 29, 2012 IEP meeting, and the WCPS' refusal to reschedule that meeting during American Education Week, caused undue and inappropriate delay. However, the Parent presented no evidence of staff availability during American Education Week and Thanksgiving week, or that it would have been possible for the appropriate staff to review the 17 page neuropsychological evaluation in what amounted to two school days prior to October 29, 2012. The WCPS specifically requested receipt of that evaluation five days prior to the IEP meeting. Further, had it not been for the Parent's lack of preparation and repeated requests to reschedule because of unavailability, the IEP meeting would have been held much earlier in 2012.

The Parent also alleged that she was not allowed meaningful participation in the IEP process, because the concerns that she shared at the December 2011 were dismissed. She alleged further that the IEP team did not consider documentation of the Student's class work that she provided. She did not present evidence to establish this allegation. The Parent admitted that she participated in revising the Student's IEP in the Fall of 2011. She agreed that she attended every IEP meeting. It appears this allegations stems from the fact that the school-based members of the IEP team decided to terminate the Student's special education instruction, and she did not agree with that decision. However, Ms. XXXX' testimony convinced me that she considered a

wide-variety of data in her assessment, including input from the Parent. The decision was that of the IEP team. While I understand that the Parent may not have agreed with the decision, there is no evidence that her concerns were not considered. She did not present any evidence to establish that the decision was improper. In fact, the evidence that she did present established the appropriateness of the IEP team decision. I conclude that the Parent did not establish this allegation.

The next allegation in the Due Process Complaint claims that the WCPS' evaluations were inadequate and inaccurate. The Parent did not present any evidence to establish this contention.

The Parent alleged further that the WCPS discriminated against the Student due to his age, by removing him from the December 20, 2011 IEP meeting. The Due Process Complaint claimed that it was not the right of the WCPS to decide if the Student could attend. The composition of the IEP team is set forth in 34 C.F.R. section 300.321(a)(7), which states that the student is to be part of the IEP team whenever it is appropriate. *See also* COMAR 13A.05.01.07A(1)(g) (the IEP team should include the student, *if appropriate).* The Student testified that he wanted to be at the meeting so that he could tell the IEP team which accommodations he wanted to keep in place. He conceded that his teacher removed him from the meeting because of the stressful atmosphere, given Mr. XXXX's objection to his attendance and the ensuing argument with the Parent. I conclude that the evidence established that, under those circumstances, the Student's attendance was not appropriate and would have subjected him to an unduly stressful and upsetting situation. Further, the Parent could have relayed the Student's wishes without exposing him to those circumstances. There is no evidence that the removal of the Student from the IEP meeting was for any discriminatory reason.

The Due Process Complaint next alleges that the WCPS "special education teacher failed to follow protocol when administering the Woodcock Johnson IV as part of his triennial reevaluation." The Parent did not provide any evidence regarding this allegation.

The Parent also alleged that she "strongly objected" to the determination that the Student was no longer eligible for special education services. She claimed that the IEP team refused to discuss the matter further despite her concerns. As stated above, the Parent presented no evidence that would indicate that the decision was not an IEP team decision or that the determination was improper.

The Due Process Complaint also indicated that the WCPS failed to "seriously consider the findings and recommendations provided by Dr. XXXX (physician) and Dr. XXXX (psychologist)." The Parent testified that after the Student was hospitalized and placed on home/hospital instruction, Dr. XXXX, the Student's pediatrician, recommended that the Student return to school on a graduated basis with a new IEP. During cross-examination of the Parent, the WCPS submitted the letter from Dr. XXXX, which recommended that the Student receive accommodations which allow him to attend classroom instruction for reading and "specials,"[10] that he have a green card to tell his teacher when he needs a break, that he not be unattended in the halls, and that his previous IEP accommodations be restored. WCPS Ex. #27. The letter did not contain a diagnosis. At that point, the Parent says that she wrote a letter asking for an evaluation.

As stated, the WCPS attempted on at least four occasions to schedule an IEP meeting to discuss and consider Dr. XXXX's letter, independent evaluations, and any other new information

[10] The Parent testified that "specials" referred to classes like music and art.

that the Parent wanted the IEP team to consider. The meetings were cancelled or postponed pursuant to the Parent's requests and the Parent's inability to obtain the neuropsychological evaluation in time for the scheduled meetings. The evidence revealed that the WCPS followed proper procedures, and there was no evidence that the WCPS violated any applicable statutes or regulations.

There were two allegations in the Due Process Complaint that I determined at the Telephone Prehearing Conference not to be proper for me to decide as part of this due process hearing. One was an issue regarding the Student's disqualification from a 504 plan, and the other was concerning testing security, grading of benchmarks, and access to benchmarks. No evidence was presented on these issues as a result of my determination and I will not address them further in this decision.

The Parent testified several times that the Student's grades declined after he was no longer receiving special education services. She did not present any documentation to support that contention. The only evidence of the Student's grades after the discontinuation of his IEP was the report card dated February 28, 2012, mentioned above in my discussion pertaining to the Parent's Motion for Summary Decision. This report card very clearly showed that the Student's grades, at least until that point, were consistently As and Bs, and either stayed the same or improved with the exception of Science, when the grade went from an A to a B. WCPS Ex. #62. The WCPS moved that report card into evidence during cross-examination of the Parent. The Parent testified several times that a later report card established otherwise, but any later report card was not part of the record before me.

Based on my analysis herein, I must conclude that the WCPS Motion for Judgment must be granted. The Parent did not present sufficient evidence of the allegations set forth in the Due

Process Complaint. The Due Process Complaint also listed several proposed solutions; however it is not necessary that I address those solutions, given my conclusion that she did not meet her burden of proof. While I am very cognizant of the difficulty an unrepresented parent faces bearing the burden of establishing very complex and emotionally charged issues, I cannot conclude differently given the evidence that lack of evidence in the record.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent's Motion for Summary Decision must be denied, as there are genuine issues of material fact in dispute, and the Parent is not entitled to a decision in her favor as a matter of law. COMAR 28.02.01.12E; COMAR 13A.05.01.06A; U.S.C. § 1412(3)(A); 34 C.F.R. § 300.111.

I further conclude, that the WCPS' Motion for Judgment should be granted, because the Parent failed to present evidence sufficient to meet her burden of establishing the allegations in her Due Process Complaint. COMAR 28.02.01.12D; 20 U.S.C. § 1412(3)(A);

ORDER

I **ORDER** that the Parent's Motion for Summary Decision is **DENIED,** and I further **ORDER,** that the Wicomico County Public Schools' Motion for Judgment is **GRANTED,** and the Parent's Due Process Complaint is **DISMISSED.**

January 29, 2013
Date Decision Mailed

Susan A. Sinrod
Administrative Law Judge

SAS/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.