

XXXX XXXX,  
STUDENT

v.

PRINCE GEORGE'S COUNTY  
PUBLIC SCHOOLS

\* BEFORE TAMEIKA LUNN-EXINOR,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH CASE NO.: MSDE-PGEO-OT-12-00064

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**DECISION**

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

**STATEMENT OF THE CASE**

On January 3, 2012, XXXX and XXXX XXXX (Parents),<sup>1</sup> on behalf of their daughter, 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 Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A § 1415(f)(1)(A) (2010). As relief, the Parents seek placement and funding at an appropriate non-public program for the remainder of the 2011-2012 school year during which PGCPS allegedly failed to provide the Student a free appropriate public education (FAPE) and compensatory education for the 2010-2011 school year during which PGCPS allegedly failed to provide the Student a FAPE.<sup>2</sup>

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<sup>1</sup> Because only Mr. XXXX testified, I will refer to him in this decision as "Parent;" I will refer to both Mr. and Ms. XXXX, collectively, as "Parents."

<sup>2</sup> The Parents also requested reimbursement of reasonable costs and fees associated with this matter, which I have no authority to award. (Bd. Ex. 13, pg. 4)

A resolution meeting was held on January 12, 2012, but the parties were not able to resolve their dispute.

I held a telephone prehearing conference on February 22, 2012. The Parents were represented by Holly Parker, Esquire. Jeffrey A. Krew, Esquire, represented PGCPs. Based on the unavailability of the parties, I conducted a hearing on March 19, 20 and 22, 2012.<sup>3</sup> The parties waived the forty-five day requirement and agreed that I would issue my decision within thirty days from the close of the record, or April 23, 2012.<sup>4</sup> 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2008). At the close of the Parents' case, PGCPs made an oral Motion for Judgment. Code of Maryland Regulations (COMAR) 28.02.01.12E. I reserved ruling on the motion until the time I issue a final decision in this matter.

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. 2011); COMAR 13A .05.01.15C; COMAR 28.02.01.

### ISSUES

1. Should PGCPs' Motion for Judgment be granted?

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<sup>3</sup> Counsel for both parties had very busy schedules with hearings at the end of February and the beginning of March. The first date available for both parties was March 19, 2012.

<sup>4</sup> In accordance with the regulations governing the time frames for the issuance of special education decisions, the decision in this case would be due on or before March 22, 2012, which is forty-five days after both parties executed the Notice of Outcome of Resolution Meeting on February 6, 2012. 34 C.F.R. § 300.515(a). The record in this matter closed on March 22, 2012. Thirty days from March 22, 2012 is April 22, 2012, which is a Sunday. The next business day is April 23, 2012.

2. Did PGCPS fail to properly consider all information provided to the Individualized Education Program (IEP) team, including information provided by the Parents and their educational consultant when developing the Student's IEP for the 2011 – 2012 school year?
3. Did PGCPS fail to include the Parents as equal participating members of the IEP team when developing the Student's IEPs for the 2010 – 2011 and 2011- 2012 school years?
4. Did PGCPS offer the Student appropriate Extended School Year (ESY) services for Summer 2011?
5. Did the Student's IEP for the 2010-2011 school year fail to provide the Student a FAPE by not (a) developing an appropriate IEP, (b) providing appropriate modifications and accommodations, (c) providing adequate related services, and (d) offering a full continuum of education services?
6. Did the Student's IEP for the 2011-2012 school year fail to provide the Student a FAPE by not (a) developing an appropriate IEP, (b) providing appropriate modifications and accommodations, (c) providing adequate related services, and (d) offering a full continuum of education services?
7. If so, are the Parents entitled to compensatory education for the 2010-2011 school year?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**<sup>5</sup>

The following exhibits were admitted on behalf of the Student:

Parent #6      August 29, 2011 Letter from Holly Parker to XXXX XXXX

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<sup>5</sup> Some of the exhibits that were presented to me in binders by the parties and listed in numerical order by the parties were not offered.

- Parent #13 April 28, 2011 [Program] ([PROGRAM]) speech-language initial evaluation
- Parent #14 August 31, 2011 [PROGRAM] development and learning initial evaluation
- Parent #17 January 8, 2010 Letter from XXXX XXXX
- Parent #29 November 15, 2011 PGCPS speech-language observation
- Parent #31 November 15, 2011 Letter from XXXX XXXX
- Parent #35 December 5, 2011 IEP (pages 37-45 only)
- Parent #43 Resume of XXXX XXXX

The following exhibits were admitted on behalf of PGCPS:<sup>6</sup>

- Bd. #1 February 5, 2010 Psychological Report – XXXX XXXX
- Bd. #2 April 26, 2010 Assistive Technology Consultation – XXXX XXXX, NBCT
- Bd. #3 May 19, 2010 Educational Assessment Report – XXXX XXXX
- Bd. #4 May 20, 2010 IEP Meeting Documentation
- Bd. #5 November 15, 2010 IEP Meeting Documentation
- Bd. #6 January 19, 2011 IEP Meeting Documentation
- Bd. #7 2011 Alt-MSA Scores
- Bd. #9 April 29, 2011 IEP Meeting Documentation
- Bd. #10 June 9, 2011 IEP Meeting Documentation
- Bd. #11 2010-2011 School Year Work Samples & Data Collection Portfolio
- Bd. #13 August 22, 2011 Request for Mediation/Due Process Hearing
- Bd. #14 September 2, 2011 Letter to Holly Parker from XXXX XXXX
- Bd. #15 October 5, 2011 Letter to OAH from Holly Parker
- Bd. #16 October 5, 2011 Letter to XXXX XXXX from Holly Parker

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<sup>6</sup> Board Exhibit Nos. 1,4,5,6,9,10,13,14,15,16,17,19 and 21 were entered into evidence during the Student's case in chief.

- Bd. #17      October 19, 2011 CIEP Meeting Documentation
- Bd. #18      November 3, 2011 Brigance Inventory of Early Development II – XXXX XXXX
- Bd. #19      October 24, 2011 – November 10, 2011 G&O Informal Evaluation – XXXX  
XXXX
- Bd. #20      November 10, 2011 Assessment Report – XXXX XXXX
- Bd. #21      December 9, 2011 CIEP Meeting Documentation
- Bd. #25      March 5, 2012 Letter to Jeffrey Krew from XXXX XXXX
- Bd. #30      XXXX XXXX Curriculum Vitae
- Bd. #33      XXXX XXXX Curriculum Vitae
- Bd. #39      XXXX XXXX Curriculum Vitae

B.      Testimony

The Parents presented the following witnesses:

- XXXX XXXX, [School 1] ([SCHOOL 1]), Certified Adaptive Physical Education teacher
- XXXX XXXX, [SCHOOL 1], Special Education Program Coordinator
- XXXX XXXX, [School 2] ([SCHOOL 2]), [Class 1] ([CLASS 1]) teacher
- XXXX XXXX, [SCHOOL 2], Intensive Special Education teacher
- Dr. XXXX XXXX, accepted as an expert witness in Special Education
- XXXX XXXX, Parent

PGCPS presented the following witnesses:

- XXXX XXXX, [SCHOOL 1], [CLASS 1] Teacher, accepted as an expert in Special Education
- XXXX XXXX, [SCHOOL 2], School Psychologist, accepted as an expert in School Psychology
- XXXX XXXX, [SCHOOL 2], Special Education Chair, accepted as an expert in Special Education

**FINDINGS OF FACT**

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

**General Background**

1. The Student is an eleven-year-old girl, who attended [School 1] ([SCHOOL 1]), a PGCPS school, for fifth grade. During the 2011-2012 school year, the Student is in sixth grade at [School 2] ([SCHOOL 2]), also a PGCPS school.

2. The Student resided in [City], XXXXXX until January 2010 when her family moved to Maryland. The Student received special education services in XXXXXX.

3. The Student has been diagnosed with apraxia. Her primary disability is an intellectual disability.

4. The Student is a very pleasant, happy and social child. She has no behavior or aggression problems.

**2009 - 2010 School Year (Fourth Grade)**

5. In the fourth grade (2009-2010 school year), in XXXXX, the Student was identified with a primary disability of physical and a secondary disability of speech/language. She received speech and occupational therapy (OT) in school. She was non-verbal but could make her wants and needs known through signs, gestures, pictures and some vocalizations. The Student was able to sit at her desk and follow a picture work schedule and could match picture to picture in a story book. The Student could become easily distracted and sometimes needed verbal prompting to return to task. She was able to recognize her name in a variety of prints, tracing her name independently although she would sometimes trace the letters out of order. She knew the letters of her name and would try to write them independently in a scattered pattern. The Student could point to all eight primary colors when asked and could verbally identify "red". She could identify "blue," "brown," and "orange" with sign prompts. She knew triangle and circle, could identify numbers 1 through 9 and count from 1 to 11 consistently, although it could be hard to understand her. The Student recognized "A" as apple and upper case letters "J," "T,"

“N,” “X,” “O,” “Z,” “S,” and “W” as “wa”. She recognized the following lower case letters “t,” “y,” “x,” “r,” “o,” “z,” “s,” and “w” as “wa”.

6. The Student moved from XXXXXX to Maryland in January, 2010 which was the second half of fourth grade. The Student was placed in [Class 1] ([CLASS 1]) classes at [SCHOOL 1] where her teacher was XXXX XXXX.

7. On February 5, 2010, the Student was referred for a cognitive assessment in order to help determine appropriate placement and level of services as a student with special needs. PGCPs School Psychologist XXXX XXXX assessed the Student using the Comprehensive Test of Non-Verbal Intelligence (CTONI-2) and the Vineland-II (VABS-II) test which tests for adaptive behaviors such as communication, daily living and socialization skills.

8. The CTONI-2 results indicated that the Student had a full scale IQ score of 49 placing her within the Intellectual Disabled range of intellectual functioning. The Student scored lower than the 1<sup>st</sup> percentile of the population.

9. The results of the VABS-II test results indicated an adaptive behavior score of 63, which fell within the low range; a communication domain standard score of 57; a daily living skills domain score of 68; and a socialization domain score of 64. These results indicated that the Student’s strengths are in the areas of social skills (social interactions) and activities of daily living (self-help skills).

10. The Student is intellectually disabled based on her cognitive functioning and adaptive behaviors as demonstrated in the PGCPs psychologists report. The Student experiences severe difficulty in performing at a level consistent with peers on academic/learning and social/communication skills. The psychologist recommended a multi-sensory approach to

instruction for the Student and indicated that she would benefit from as much practice, drill, review, and repetition as can be built into a learning situation.

11. When the Student entered the 4<sup>th</sup> grade class at [SCHOOL 1], she was not talking and was using gestures to communicate. She was very attached to her mother and it took her three months to settle into the classroom. The Student was very quiet and did not participate in class. When she arrived in the [SCHOOL 1] [CLASS 1] class, she was withdrawn and unfocused. She needed a lot of modeling and prompting in order to get her to respond.

12. The Student takes some time to warm up to new people and places but she did not demonstrate problems with anxiety.

13. On or before May 20, 2010, an Assistive Technology Consultation was performed to assist the IEP Team to determine whether assistive technology (AT) devices or services might help with the Student's difficulties in communication. The consultant was a school psychologist, XXXX XXXX. Mrs. XXXX recommended the use of a picture-based communication system (PCS), aided language stimulation (ALS) as a modeling technique, and topic boards.

14. In May 2010 of the Student's 4<sup>th</sup> grade year, the Student was functioning below a kindergarten level. She needed small group specialized instruction from a special education teacher. The Student also needed encouragement and support to complete required tasks.

15. An IEP meeting was held on May 20, 2010 to review and, if appropriate, revise the IEP and to consider ESY services. The Student was pursuing a Maryland High School Certificate or Program Completion. She required extensive and substantial modifications of the general education curriculum with intensive instruction and extensive supports. The Student participated in the Alt-MSA and was eligible for ESY for Summer 2010. (Bd. Ex. #4)

16. As of May 20, 2010, the Student was making sufficient progress to meet her goals in reading phonics, reading comprehension, math calculation, written language mechanics and self management. In the area of pre-academic, independent living and socialization, she was not making sufficient progress to meet her goals.

17. The May 20, 2010 IEP for the Student had the following goals and achievements:

Reading Phonics Goal by: 1/20/11		Progress towards goal
Objective 1: Given flash cards, letter manipulatives, worksheets, and/or alphabet games, the Student will identify and recognize both uppercase and lowercase letters of the alphabet Objective 2: Given letter manipulative and/or worksheets, the Student will sequence the letters of her name		4/15/10 – Making sufficient progress to meet goal  The Student shows progress when recognizing letters when presented with flash cards, manipulatives, worksheets and tapes with 70% accuracy. She mastered Objective 2 but is working on identifying lower case letters (b,d) when given upper case letters (A-F)
Reading Comprehension Goal by 1/20/11		Progress towards goals
Objective 1: Given a modified grade level text, the Student will identify how speech can be written and read Objective 2: Given a modified grade level text, the Student will understand that print conveys meaning Objective 3: Given a grade level textbook, the Student will demonstrate the proper use of a book Objective 4: Given various pictures, shapes, letters, numerals, and primary colors, the Student will sort these items into categories		4/15/10 – making sufficient progress to meet goal  The Student is working hard on developing general reading comprehension skills by demonstrating an understanding of concepts of print to determine how print is organized and read with prompting. She is completing the task with picture support and verbal prompts.
Objective 1: Given modified grade level, the Student will listen to and be included in discussions about a variety of literary texts representing diverse cultures, perspectives and ethnicities Objective 2: Given modified grade level texts, the Student will listen to and be included in discussions about a variety of different types of fictional literary text, such as stories, poems, nursery rhymes, realistic fiction and fairy tales.		4/15/10 – making sufficient progress to meet goal  The Student is showing progress when developing comprehension skills by listening to a variety of texts with about 80% accuracy and verbal prompting
Math Calculation Goal by 1/20/11		Progress towards goal
Objective 1: Given symbols, manipulatives, and models the Student will build and demonstrate her concept of “number”		4/15/10 - making sufficient progress to meet

<p>Objective 2: Given manipulatives and/or worksheets, the Student will identify quantity</p> <p>Objective 3: Given a picture graph, pictograph, and/or table, the Student will compare data and identify which category has more, less, or the same</p> <p>Objective 4: Given a worksheet/manipulative/100 chart, the Student will count objects and numbers from 1 to 20</p>	<p>The Student demonstrated understanding of number relationships. She has been introduced to all of the objectives in this goal but she is showing progress when identifying and showing the quantities of number 1-5 with verbal and model prompts</p>
<p>Objective 1: Given plane geometric figures, the Student will sort objects by one attribute such a shape, color and size</p> <p>Objective 2: Given plane geometric figures, the Student will name the attributes of plane figures such as shape, color, size</p>	<p>4/15/10 - making sufficient progress to meet goal</p> <p>The Student shows progress when sorting and naming plane geometric shapes with 70% accuracy. She identifies circle, square, rectangle and triangle.</p>
<p>Objective 1: The Student will match patterns kinesthetically such as: clap/snap/clap...</p> <p>Objective 2: The Student will recognize simple patterns</p>	<p>4/15/10 - making sufficient progress to meet goal</p> <p>The Student is making progress when identifying, copying and extending non-numeric patterns, given repeating patterns using symbols, shapes, designs, and/or pictures. She is completing this goal with verbal and model prompts</p>
<p>Written Language Mechanics Goal by 1/20/11</p>	<p>Progress towards goal</p>
<p>Objective 1: The Student will match upper case letter with corresponding lower case letter for 10 letters of the alphabet in 4 of 5 trial</p> <p>Objective 2: The Student will recognizably copy 3 of 6 letters in her first name</p> <p>Objective 3: The Student will recognizably form the following letters using a model E, F, H, I, L</p>	<p>4/15/10 - making sufficient progress to meet goal</p> <p>The Student is working hard on her writing skills with 50-60% accuracy. She is matching letter Aa-Ff but she mixes up letters (b,d). She legibly copies letters in her name (J,s,m,y,n) but not (a). She is working on forming letters (E,F,H,I,L) from a model</p>
<p>Communication Goal by 1/20/11</p>	<p>Progress towards goal</p>
<p>Objective 1: The Student will increase spontaneous expressive vocabulary to 20 words, in any modality (i.e., gesture, verbalization)</p> <p>Objective 2: The Student will increase vocabulary to 20 familiar household, personal care, and classroom items</p> <p>Objective 3: The Student will respond to a “who”, “what”, “where” questions by constructing utterances of 1-2 words, such as “ a ____”, “the ____” given access to a picture symbols</p> <p>Objective 4: The Student will imitate target plosive and/or contingent sounds in the</p>	<p>6/16/10 - making sufficient progress to meet goal</p> <p>Spontaneously, the Student attempts verbalization, vocalization and signing to convey her wants, needs and opinions in the structured</p>

initial position of words, during structured tasks and given multi modality cues	setting. Her intelligibility is fair to poor. She has difficulty with multi-syllabic words and 2-word utterances. She is an avid communicator and the school will continue to investigate technology.
Pre-Academic, Independent Living, Socialization Goal by 1/20/11	Progress towards goal
Objective 1: The Student will identify colors including red, yellow, blue, pink, white, brown, black Objective 2: The Student will identify shapes including: square, triangle, rectangle, oval Objective 3: The Student will demonstrate the ability to recognize numbers 1-5 and count 15 objects correctly Objective 4: The Student will identify and recognize letters of the alphabet and be able to put letters in her name in order	4/15/10 – not making sufficient progress to meet goal (IEP team needs to meet to address insufficient progress
Self-Management Goal by 1/20/11	Progress towards goal
Objective 1: The Student will self-initiate activities, tasks assignments, etc. and complete those activities, tasks, assignments independently Objective 2: The Student will participate in a circle or large group activity for 15-20 minutes independently	4/15/10 - making sufficient progress to meet goal  The Student works on participating in activities, completing tasks and working on assignments with 50% accuracy. She works with peers in a group for 15-20 minutes with verbal and model prompts

(Bd. Ex. #4, pp. 20-28)

**2010 - 2011 School Year (Fifth Grade)**

18. In the fifth grade, the Student continued in the special education [CLASS 1] program taught by XXXX XXXX. The Student's class consisted of 6 students, Mrs. XXXX, a paraprofessional, and a dedicated aide. The Student did not have a dedicated aide.

19. On November 15, 2010, an IEP meeting was convened to address parental concerns. At this IEP meeting, the Student's Parents expressed concern that the Student was not on the same level as other classmates in the areas of writing words and sentences. The Parents were concerned that the Student needed too much 1-to-1 assistance while doing homework and that, when left to work independently, could not complete her work. The Parents were

concerned about middle school placement and asked what they should do if they wanted the Student in a private school for middle school. The Parent's were "okay" with the Student's fifth grade placement but wanted to explore options for middle school. (Bd. Ex. #5, pg. 4)

20. On January 19, 2011, an IEP meeting was convened to review and, if appropriate, revise the IEP and to consider ESY services. Present level assessments of the Student were provided on November 15, 2010 and January 6, 2011. (Bd. Ex. #6)

21. The January 19, 2011 IEP for the Student had the following goals and achievements:

Reading Phonics Goal by: 1/20/11	Progress towards goal
Objective 1: Given flash cards, letter manipulatives, worksheets, and/or alphabet games, the Student will identify and recognize both uppercase and lowercase letters of the alphabet Objective 2: Given letter manipulative and/or worksheets, the Student will sequence the letters of her name	4/15/10, 11/15/10 and 1/6/12 – Making sufficient progress to meet goal  1/6/11 – The Student recognizes that letters have corresponding sounds. She is matching upper and lower case letters (A-F). There are inconsistencies in her work and she is encouraged to focus and not rush. The Student can write her name with a model but she requires extended time. The Student does not always write her name in sequence but she can write all the letters in her name with prompting. The Student should work on writing the letter "a" legibly and the letter "s" not backwards.
Reading Comprehension Goal by 1/20/11	Progress towards goals
Objective 1: Given a modified grade level text, the Student will identify how speech can be written and read Objective 2: Given a modified grade level text, the Student will understand that print conveys meaning Objective 3: Given a grade level textbook, the Student will demonstrate the proper use of a book Objective 4: Given various pictures, shapes, letters, numerals, and primary colors, the Student will sort these items into categories	4/15/10 – making sufficient progress to meet goal  1/6/11 - Achieved
Objective 1: Given modified grade level, the Student will listen to and be included	4/15/10 – making sufficient

<p>in discussions about a variety of literary texts representing diverse cultures, perspectives and ethnicities</p> <p>Objective 2: Given modified grade level texts, the Student will listen to and be included in discussions about a variety of different types of fictional literary text, such as stories, poems, nursery rhymes, realistic fiction and fairy tales.</p>	<p>progress to meet goal</p> <p>1/6/11 - Achieved</p>
<p>Math Calculation</p> <p>Goal by 1/20/11</p>	<p>Progress towards goal</p>
<p>Objective 1: Given symbols, manipulatives, and models the Student will build and demonstrate her concept of “number”</p> <p>Objective 2: Given manipulatives and/or worksheets, the Student will identify quantity</p> <p>Objective 3: Given a picture graph, pictograph, and/or table, the Student will compare data and identify which category has more, less, or the same</p> <p>Objective 4: Given a worksheet/manipulative/100 chart, the Student will count objects and numbers from 1 to 20</p>	<p>4/15/10 - making sufficient progress to meet goal</p> <p>1/6/11 - making sufficient progress to meet goal</p> <p>She is using unifix cubes and counting objects recognizing numbers to demonstrate number concept. She completes math activities “How many”, “Count the objects”, “Count 1-20”. When focused, she can count to 11 independently. She receives reminders to assist her to focus and encouragement to complete her work. She received extended time.</p>
<p>Objective 1: Given plane geometric figures, the Student will sort objects by one attribute such a shape, color and size</p> <p>Objective 2: Given plane geometric figures, the Student will name the attributes of plane figures such as shape, color, size</p>	<p>4/15/10 - making sufficient progress to meet goals</p> <p>1/6/11 - Achieved</p>
<p>Objective 1: The Student will match patterns kinesthetically such as: clap/snap/clap...</p> <p>Objective 2: The Student will recognize simple patterns</p>	<p>4/15/10 - making sufficient progress to meet goal</p> <p>11/15/10 – Achieved and mastered</p>
<p>Written Language Mechanics</p> <p>Goal by 1/20/11</p>	<p>Progress towards goal</p>
<p>Objective 1: The Student will match upper case letter with corresponding lower case letter for 10 letters of the alphabet in 4 of 5 trial</p> <p>Objective 2: The Student will recognizably copy 3 of 6 letters in her first name</p> <p>Objective 3: The Student will recognizably form the following letters using a model E, F, H, I, L</p>	<p>4/15/10 - making sufficient progress to meet goal</p> <p>1/6/11 - making sufficient progress to meet goal</p> <p>The Student is matching up to 6 upper case and lower case letters with more then 1 verbal and model prompts. She copies all letters in her name although not legible when rushing. She should continue to work on letters (a,s – not backwards and y) in her name and copying in sequential order. She copies the letters (E,F,H,I,L)</p>

		properly when presented with 1 row at a time and when she is encouraged to take her time and do her best and with extended time.
Communication Goal by 1/20/11		Progress towards goal
Objective 1: The Student will increase spontaneous expressive vocabulary to 20 words, in any modality (i.e., gesture, verbalization) Objective 2: The Student will increase vocabulary to 20 familiar household, personal care, and classroom items Objective 3: The Student will respond to a “who”, “what”, “where” questions by constructing utterances of 1-2 words, such as “ a ____”, “the ____” given access to a picture symbols Objective 4: The Student will imitate target plosive and/or contingent sounds in the initial position of words, during structured tasks and given multi modality cues		6/16/10 - making sufficient progress to meet goal  2/3/11 - making sufficient progress to meet goal  The Student has been able to label illustrations and can identify them using the labels. She demonstrates knowledge by pointing and gesturing. She is able to repeat simple phrases and questions with modeling, using true word approximations and tries to produce common phrases independently. The Student uses her communication device more.
Pre-Academic, Independent Living, Socialization Goal by 1/20/11		Progress towards goal
Objective 1: The Student will identify colors including red, yellow, blue, pink, white, brown, black Objective 2: The Student will identify shapes including: square, triangle, rectangle, oval Objective 3: The Student will demonstrate the ability to recognize numbers 1-5 and count 15 objects correctly Objective 4: The Student will identify and recognize letters of the alphabet and be able to put letters in her name in order		4/15/10 – not making sufficient progress to meet goal (IEP team needs to meet to address insufficient progress  1/6/11 – making sufficient progress to meet goal  The Student mastered Objectives 1 and 2. She identifies basic shapes and colors with 1 or more verbal and model prompting. She shows some inconsistency and needs to be encouraged to focus and give her best. She identifies numbers (1,2,4,5) but shows inconsistency. She counts up to 13 objects out of 15 but sometimes stops at 10 and 12. Continue to work on number recognition and counting 15 objects. She is not consistent with identifying upper and lower case alphabet. She

	places the letter in her name in order using a model which she has mastered.
Self-Management Goal by 1/20/11	Progress towards goal
Objective 1: The Student will self-initiate activities, tasks assignments, etc. and complete those activities, tasks, assignments independently Objective 2: The Student will participate in a circle or large group activity for 15-20 minutes independently	4/15/10 - making sufficient progress to meet goal 1/6/11 - Achieved

(Bd. Ex. #4, pp. 20-28)

22. On April 13, 2011, the Student received a progress report for her IEP goals.

There was marked improvement in all areas including phonics, comprehension, written language, math and life skills.

23. In 2011, the Student took the Alternate Maryland School Assessment (Alt-MSA). The Student scored “Advanced” for reading, mathematics and science. (Testimony, pg. 206, ll.3-6)

24. On April 29, 2011, an IEP meeting was convened to review parental concerns. The Parents’ main concern was the Student’s safety as she transitioned to middle school since she is mostly non-verbal. The Parents were also concerned about the Student receiving a good education as well as special education services

25. At the April 29, 2011 IEP meeting, the Parents agreed that the Student should be assigned a dedicated assistant for the 2011-2012 school year along with pull-out speech therapy services. The Parents also agreed to a 30-day review of the Student’s progress, program and placement at [SCHOOL 2].

26. On June 9, 2011, an IEP meeting was conducted to address the Parents’ concerns. Dr. XXXX XXXX, Special Education Consultant, was present for this IEP meeting and acted as an advocate for the Parents.

27. At the June 9, 2011 IEP meeting, the Parents complained that they had not seen the progress they expected at [SCHOOL 1]. They also expressed concerns that the middle school assignment for the Student for the 2011-2012 school year was essentially the same program as [SCHOOL 1] and that the size of the school was too large. The Parents felt that the Student should be in an environment with similar students and requested a referral to the Central IEP team and consideration for non-public options. (Bd. Ex. 10, pg. 15)

28. On June 15, 2011, the Student received a progress report for her IEP goals. There was marked improvement in all areas including phonics, comprehension, written language, math and life skills.

29. The Student was approved to attend ESY from July 5, 2011 – July 28, 2011. She received classroom instruction as well as speech therapy.

30. The Student's work samples for the 2010-2011 school year show that she was progressing toward her IEP goals, although the Student was not performing some of these tasks independently because of her cognitive level. The work samples show inconsistencies in the Student's knowledge of alphabet and numbers, however, she accomplished the following during the 2010-2011 school year:

- She mastered simple patterns of clapping and snapping
- She could write her name without a model
- She improved at tracing letters

31. During the 2010-2011 school, the Student received 26 hours and 15 minutes of special education services in the [CLASS 1] program, three 30-minute sessions of speech/language therapy per month and occupational therapy as a monthly supplemental service.

The Student was included with typical peers for lunch and recess and had bi-weekly music classes with the opportunity for inclusion.

32. The PGCPS included the Parents as equal participating members of the IEP team at each IEP meeting dedicated to developing the 2010-2011 IEP's for the Student.

**ESY/ Summer 2011**

33. The PGCPS provided appropriate ESY services for the Student in the Summer of 2011.

34. The Student attended ESY in the Summer of 2011; however, she missed approximately 1-1/2 weeks of the 4-week program.

35. During the summer of 2011, the Parents retained counsel and filed a Request for Mediation/Due Process Hearing on August 22, 2011.

36. In August, 2011, the Parents requested information from the PGCPS for Home and Hospice Teaching. The PGCPS sent the required forms to the Parents on September 2, 2011.

**2011 - 2012 School Year (Sixth Grade)**

37. The Student did not attend the first two months of school at [SCHOOL 2]. During the first two months of the school year, the Student was taught by her mother at home. The Student's mother did not utilize a home schooling curriculum nor did she get approval from the PGCSC to home school the Student.

38. The Student regressed academically during the summer and fall of 2011.

39. On October 5, 2011, the Parents withdrew their request for a due process hearing. A Central IEP team meeting was scheduled for October 19, 2011 and a time was scheduled for Dr. XXXX, the Parent's educational consultant, to observe [SCHOOL 2].

40. On October 17, 2011, Dr. XXXX observed a science class and music class at [SCHOOL 2] before the Student began attending the school.

41. On October 19, 2011, the PGCPS Central IEP Team convened to determine the level of special education services required to appropriately meet the Student's educational needs. The Parents stated that they did not believe the Student made any "significant progress" in the year and a half she was in the [CLASS 1] Program at [SCHOOL 1]. The Parents were considering home schooling if private school was not recommended by the team. (Bd. Ex. 17, pg. 15)

42. At the October 19, 2011 meeting, the Parents requested placement for the Student in a private separate day school setting, namely [Program].

43. On October 19, 2011, the Central IEP Team stated that the Student made meaningful progress in the [CLASS 1] Program which was reflected in the progress reports. The Central IEP Team recommended the following for the 2011-2012 school year:

- 26 hours, 45 minutes of special education services per week outside of the general education classroom (inclusive of speech therapy, five 30-minute sessions per month)
- 2 hours, 45 minutes of special education services per week inside the general education classroom (creative arts class with modifications and support)
- 2 hours, 30 minutes of general education with support (lunch period with general education peers with adult supervision/support)
- Dedicated Assistant
- Occupational Therapy as a supplemental service
- Assistive Technology/Augmentative Communication device
- Use of systematic data collection to track progress on current IEP goals and objectives
- LRE C: Separate Class Program – [CLASS 1]

(Bd. Ex. #17, pp.15-16)

44. The Central IEP team agreed to review the Student’s progress within the first 30 – 45 days in the program. Teachers at [SCHOOL 2] agreed to complete baseline data collection for the Student before the next Central IEP meeting on November 18, 2011.<sup>7</sup>

45. On October 24, 2011, the Student began to matriculate at [SCHOOL 2] as a result of the October 19, 2011, Central IEP meeting.

46. In the Fall of 2011, a Brigance Inventory Early Development test was administered by XXXX XXXX, Special Education Program Specialist, on the Student. The test revealed that the Student was significantly delayed in all areas. (Testimony pg. 218, ll. 3-19)

47. On November 10, 2011, an informal evaluation of the Students IEP Goals and Objectives was performed by Ms. XXXX. The results were as follows:

Given letter manipulates/adapted writing paper/worksheets, the Student will copy letters in her first name legibly. With up to 3 verbal and/or model prompts, 80% accuracy	The Student was not able to complete this goal when given 5 attempts write her name she wrote her name 4 times with a model and assistance and it was illegible. She continues to struggle with her letters.
Given a classroom setting, the Student will sequence letters in her name by using magnetic letters, with up to 3 verbal and/or model prompts, 80% accuracy.	She is able to point to the magnetic letters and repeat the name of the letters. When the letters are out of order, she can place the “j” in the correct order and struggles with the rest of the letters. She is able to complete with 50% accuracy.
Given a worksheet, the Student will form the following letters using a model E,F,G,H, I,L with up to 3 verbal and/or model prompts, 80% accuracy.	When given a model, the Student struggles with writing her letters. She can write the letter “e” independently but it is a difficult task. She can also write the letter “f” with some difficulty. She is not able to write the letters H, I and L.
Given a modified grade-level text with picture support, the Student will identify the story elements (main character and setting) by pointing/circling the correct response from 2-3 choices with up to 3 verbal prompts, 80% accuracy.	The Student is unable to identify the main character or setting in a story. The Student will listen to the story but is easily distracted.
Given a modified grade-level text with picture support and after listening to the story, the Student will summarize by recalling and discussing the text and sequencing three picture words presented with up to 3 verbal and/or model prompts, 80% accuracy.	The Student is unable to summarize the story or sequence three picture words
Given one, two letter word at a time from a modified grade level text and letters in order to represent the word, the Student will select from letters presented to build each “cv” pattern word with up to 3 verbal and/or model prompts 80% accuracy.	The Student is unable to place the letters in order to represent a word. When presented with the words “go, do, be, by, to, etc.”, she was unable to identify them.

<sup>7</sup> The November 18, 2011 IEP meeting was rescheduled to December 9, 2011.

Given symbols, manipulatives, and models, the Student will identify numbers 1-5 by stating each number with up to 3 verbal and/or model prompts and 80% accuracy.	The Student will count along with the teacher when given the numbers 1-5. She is unable to identify them independently with a model. She is able to identify the number "1" independently.
Given symbols, manipulatives, and models, the Student will identify numbers 6-10 by stating each number with up to 3 verbal and/or model prompts and 80% accuracy.	The Student is able to count out loud 1-10. She is unable to identify numbers 6-10.
Given picture graph, pictograph, and data, the Student will identify which category has more by comparing the data with 3 verbal and/or model prompts, 80% accuracy	The Student is able to color in a bar graph to show which category has more but not independently. This particular goal will be addressed through the Alt-MSA process.
Given worksheets/manipulatives/number chart, the Student will state the number of objects up to 20 by counting with up to 3 verbal and/or model prompts, 80% accuracy	The student is able to count objects up to the number 10 with assistance. Independently, she will count the objects to number 5.
Given worksheets/manipulatives/number chart, the Student will recognize numbers 1-20 by stating each number with up to 3 verbal and/or model prompt, 80% accuracy	The Student can follow along and count up to 20 with assistance. She does not recognize numbers beyond the number 10. She does not understand the representation of each number.
Given letters (A-F) on flash cards, letter manipulative, worksheets, and/or alphabet games, the Student will recognize similarities and differences in letter shapes by matching upper and lower case letters with up to 3 verbal and/or model prompts, 80% accuracy	The Student is able to recognize A,B,C and D and match the lower case and upper case. She does not recognize the difference between upper and lower case letters.
Given a classroom setting and non-classroom setting, the Student will remain focused on a given task for 15 minutes with up to 3 verbal prompts, 4 out of 5 consecutive observations/opportunities/days	The Student is able to focus for short periods of time. She is able to focus on a task for 6-8 minutes. During times tasks, she will ask for her dedicated assistant or ask about the school bus.
Given a classroom setting and non-classroom setting, the Student will request for any assistance required to complete a given task with up to 3 verbal prompts, 4 out of 5 consecutive observations/opportunities/days	The Student is able to ask for assistance to complete a task. She will ask for assistance even when she can complete a task independently.

(Bd. Ex. #19)

48. On November 17, 2011, Dr. XXXX observed the Student at [SCHOOL 2] in her math and language arts classes.

49. On December 9, 2011, a Central IEP team meeting was convened to conduct an annual review and develop an IEP for the Student. The Student's father, Attorney Holly Parker, and Dr. XXXX were present for the meeting. The team reviewed the baseline data and assessments completed by [SCHOOL 2]. The team, the school team and the Parents agreed that the IEP present levels and goals needed to be updated to reflect the current data.

50. At the December 9, 2011 IEP meeting, Dr. XXXX indicated that the Student needed more speech and language services. After reviewing a statement provided by the Student's speech and language service provider, the IEP team did not recommend a change in this service. (Bd. Ex. 21, pg. 15)

51. At the December 9, 2011 IEP meeting, the adaptive physical education (PE) teacher recommended that a checklist be completed to formally assess the Student for adaptive PE. Adaptive PE was not a concern for the Parents.

52. At the December 9, 2011 IEP meeting, the team recommended that the Student continue in her current program and placement in the separate class ([CLASS 1]) program at [SCHOOL 2]. The Parents disagreed with the recommendation and asked for placement at the [Program] where the Student could receive increased staffing, assistive technology supports (specifically, an iPad), integrated related services supports, a smaller class and the same daily schedule. (Bd. Ex. 21, pg. 15)

53. The Central IEP team rejected the request for a more restrictive, full-time, separate day school placement.

54. The Student's IEP can be implemented in the [CLASS 1] program at [SCHOOL 2] where she will have daily access to and participation with non-disabled peers.

55. The IEP goals established by Ms. XXXX on November 10, 2011 were implemented. The Student's progress was assessed on February 1 -3, 2012 and March 7, 2012 and the Student was "making sufficient progress to meet goals." (Bd. Ex. #21, pg. 30 – 33)

56. The PGCPs properly considered all information provided to the IEP team, including information provided by the Parents and their educational consultant when developing the 2011-2012 IEPs.

57. The PGCPs included the Parents as equal participating members of the IEP team at each IEP meeting dedicated to developing the 2011-2012 IEPs for the Student.

58. The Student's area of strength is that she is a very hard-working student. She arrives on time for school and is prepared for class. She brings her materials and her homework. The Student has become used to her schedule and is able to adapt to change throughout the school day. She is eager to attend science and math class each day. She is a great volunteer and loves to help with classroom tasks such as collecting papers, distributing materials or cleaning up. She is happy and wants to please the adults and students who work with her. She is excited when reading with picture supports, looks forward to listening to books on tape and participates actively when working on a computer program. The Student enjoys singing, dancing and playing sports such as volleyball and soccer. She enjoys the class field trips.

## DISCUSSION

### Burden of Proof

The Parents, as the party challenging the IEPs proposed by PGCPs for the 2010-2011 and 2011-2012 school years, have the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The Parents' burden is "by a preponderance of the evidence." Md. Code Ann., State Gov't § 10-217 (2012).

### Legal Background

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010); 34 C.F.R. Part 300 (2011); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2010) and COMAR 13A.05.01. The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the Act. 20 U.S.C.A.

§§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

As a condition of this assistance, the respective state and local public educational agencies must have in effect policies and procedures which assure that children with disabilities residing in the State have access to a FAPE “that emphasizes special education and related services designed to meet their unique needs...”<sup>8</sup> 20 U.S.C.A. § 1400(d)(1)(A); § 1412(a)(1)(A). Maryland’s General Assembly and the State Board of Education have enacted statutes and regulations, respectively, implementing the IDEA for Maryland’s students. Maryland’s special education law is found at sections 8-401 through 8-417 of the Education Article of the Annotated Code of Maryland. COMAR 13A.05.01 contains the Maryland regulations governing the provision of special education to children with disabilities.

The IDEA defines a FAPE, in pertinent part, as “special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge;...[and] are provided in conformity with the individualized education program

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<sup>8</sup> COMAR 13A.05.01.03B provides in pertinent part:

(65) Related Services.

(a) "Related services" means transportation and such developmental, corrective, and other supportive services as may be required to assist a student with a disability to benefit from special education.

...

(71) Special Education.

(a) “Special education” means specifically designed instruction, at no cost to the parents, to meet the unique needs of a student with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

(b) “Special education” includes speech-language pathology services, travel training, career and technology education, and instruction in physical education if the service consists of specially designed instruction.

...

(72) "Specially designed instruction" means the adaptation of content, methodology, or delivery of instruction to address the unique needs of a student with a disability to ensure access to the general curriculum, so that the student can meet the educational standards that apply to each student within the jurisdiction of the public agency.

required under section 1414(d) of this title.” 20 U.S.C.A. § 1401(9)(A) and (D). *See also* Md. Code Ann., Educ. § 8-401(a)(3).

FAPE is also defined at COMAR 13A.05.01.03B(27) as special education and related services that:

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

In *Rowley*, the Supreme Court described FAPE as follows:

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

*Id.* at 200-201. A student is not entitled to “the best education, public or nonpublic, that money can buy” 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*. Instead, FAPE is satisfied when a child’s IEP is designed to allow the child to receive educational benefit. *Rowley*, 458 U.S. at 203. The benefit conferred by an IEP and placement must be “meaningful,” however, and not merely “trivial” or “*de minimis*.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking into account:

- (i) the strengths of the child;
- (ii) the concerns of the Parents for enhancing the education of their child;

- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iii) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3).

Accordingly, the IDEA specifically charges the states to deliver special education designed with the unique needs of a particular student in mind, along with sufficient related services to permit the student to benefit educationally from instruction.

The chief mechanism for accomplishing this purpose is the IEP. The IEP depicts a student's current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A); *see also* COMAR 13A.05.01.09A.

The Supreme Court has set out a two-part inquiry to determine whether a local education agency (LEA) has satisfied its obligation to provide a FAPE to a student with disabilities. A determination first must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, as to whether an IEP developed through the required procedures is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 206-207.

A procedural violation is actionable under the IDEA only if it impeded the child's right to a free appropriate public education, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or caused a deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007) (citing 20 U.S.C.A. section 1415(f)(3)(E)(i)); *D.S. v. Bayonne Bd. of Educ.*, 602 F3d 553, 565 (3<sup>rd</sup> Cir. 2010).

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to acquire a FAPE.

COMAR 13A.05.01.10 provides in pertinent part:

.10 Least Restrictive Environment (LRE).

...

B. Continuum of Alternative Placements. A public agency shall ensure that:

(1) A continuum of alternative placements is available:

(a) To the extent necessary to implement the IEP; and

(b) To meet the needs of students with disabilities for special education and related services;

(2) Alternative placements include the settings as listed in Regulation .03B(71)<sup>9</sup> of this chapter; and

(3) Provisions for supplementary services, such as resource room and itinerant instruction, are available in conjunction with regular class placement.

C. Placements.

(1) A public agency shall ensure that:

(a) The educational placement decision of a student with a disability is:

(i) Made by the IEP team;

(ii) Made in conformity with the LRE provision of the Act and Regulation .10 of this chapter;

(iii) Determined at least annually;

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<sup>9</sup> COMAR 13A.05.01.03B(71) provides:

(71) Special Education.

(a) "Special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a student with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

(b) "Special education" includes speech-language pathology services, travel training, career and technology education, and instruction in physical education if the service consists of specially designed instruction.

(iv) Based on the student's IEP; and

(v) As close as possible to the student's home;

(b) Unless the IEP of a student requires some other arrangement, the student is educated in the school or typical early childhood setting that the student would attend if not disabled;

(c) In selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs. . . .

This means that, ordinarily, disabled and non-disabled students should be educated in the same class. 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114(a)(2)(i) and 300.117.

Mainstreaming disabled children into regular school programs may not be appropriate for every disabled child, however. 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. In such a case, FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district.

*Burlington*, 471 U.S. at 369.

When fashioning equitable relief for a denial of FAPE, the hearing examiner has broad discretion. *Sch. Comm of Burlington v. Dep't of Educ*, 471 U.S. 359, 370-71 (1985).

Compensatory education is an equitable remedy that the court may award in crafting appropriate relief. *See Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994); *Reid v. District of Columbia*, 401 F.3d 516, 523-524 (D.C. Cir. 2005). It is available to remedy an educational deficit created by a school system's failure to provide a student with a FAPE over a given period of time. *G v. Fort Bragg Independent Schools*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003).

#### Positions - generally

Procedurally, the Parents alleged that in developing the Student's IEPs for the 2010-2011 and 2011-2012 school years, PGCPs failed to properly consider all information provided to the

IEP team, including but not limited to information provided by the Parents and their educational consultant; failed to include the Parents as equal participating members of the IEP team; and failed to offer a full continuum of educational services.

Substantively, in this case, the Parents alleged that (1) the IEP for the Student for the 2010-2011 school year failed to provide the Student with a FAPE, including failing to offer adequate special education and related services, and appropriate modifications and accommodations,<sup>10</sup> and failing to offer ESY<sup>11</sup> services for Summer 2011; (2) the IEP developed for the 2011-2012 school year failed to provide the Student with a FAPE, including failing to offer adequate special education and related services, appropriate modifications and accommodations, and, in particular, failing to offer an appropriate placement.

As relief, the Parents requested (1) compensatory education for the 2010-2011 school year during which PGCPS allegedly failed to provide the Student a FAPE; (2) continued placement and funding at an appropriate non-public program for the 2011-2012 school year; and (3) reimbursement for costs associated with this matter.

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<sup>10</sup> COMAR 13A.05.01.03B provides:

(1) "Accommodation" means practices and procedures, in accordance with the Maryland Accommodations Manual, that provide students with disabilities equitable access during instruction and to assessments in the areas of:

- (a) Presentation;
- (b) Response;
- (c) Setting; and
- (d) Scheduling.

...

(43) "Modifications" means practices that change, lower, or alter learning expectations, in accordance with the Maryland Accommodations Manual.

<sup>11</sup> ESY refers to the individualized extension of specific special education and related services that are provided to a student with a disability beyond the normal school year of the public agency or nonpublic school the student attends, in accordance with the student's IEP, at no cost to the parents of the student, and which meet the standards of the Department. COMAR 13A.05.01.03B(26)

PGCPS contended that it complied with all of the procedural and substantive requirements of the IDEA, including providing the Student a FAPE for the 2010-2011 and 2011-2012 school years.

### **PGCPS' Motion for Judgment**

PGCPS made a Motion for Judgment at the close of the Parents' case, which I held in abeyance, directing PGCPS to present its case. I informed the parties that I would make a decision on the Motion for Judgment in my written decision. COMAR 28.02.01.12E, provides as follows:

#### 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 the 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.

COMAR 28.02.01.12E is patterned after Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. Md. Rule 2-519 "allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact." *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402, n. 4 (1998). In deciding a Motion for Judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party. *Id.*

PGCPS renewed that motion at the close of all the evidence. PGCPS' position is that the Parents provided insufficient evidence to show that (1) PGCPS denied the Student FAPE and the recommended placement was inappropriate and (2) that the Student would be reasonably expected to make meaningful progress at the private school for which placement is being sought. Therefore, the Parents failed to meet their burden of proof.<sup>12</sup>

The Parents responded that they did present sufficient evidence to establish a *prima facie* case that PGCPS did not offer a FAPE to the Student for the 2010-2011 school by there being no meaningful progress towards the Student's IEP goals and 2011-2012 school year by placing the Student at [SCHOOL 2] and a lack of meaningful progress. The Parents contended that the [SCHOOL 2] program cannot meet the Student's educational needs, including the Student's need for increased staffing, assistive technology supports (specifically an iPad), integrated related service supports, a smaller class and the same daily schedule.

For the reasons that follow, I agree with PGCPS' position and will grant its Motion for Judgment. The Parents produced some evidence; however, they failed to meet their burden of proof by preponderance of the evidence to prove that the Student did not receive FAPE during the 2010-2011 and 2011-2012 school years.<sup>13</sup>

For the following reasons, PGCPS Motion for Judgment is granted.<sup>14</sup>

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<sup>12</sup> The appropriateness of the Parent's private placement choice is analyzed only if the IEP results in a denial of a FAPE. 510 U.S. 7, *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985). In this case, the Parent's requested that the IEP team place the Student at the [Program] but the Parent's did not unilaterally place the Student themselves. Whether [Program] is an appropriate placement should only be considered if there is a denial of FAPE.

<sup>13</sup> Since I find that the Parent's have failed to meet their burden regarding the issue of FAPE, I will not provide any discussion or analysis regarding this issue of whether [Program] is an appropriate placement for the Student.

<sup>14</sup> The PGCPS' Motion only covered substantive issues. I will rule on the Parents' procedural allegations separately.

## The Parents' Witnesses

### Parent Testimony – XXXX XXXX

The Student's father testified that he was concerned about the Student's progress in the PGCPs system because there was no evidence that she was moving forward with her education. He testified that the Student was staying on the same level and they were concerned that it was "crunch time" and it was time for the Student to start learning something. The program she was in at [SCHOOL 1] was not "doing it for her." (Testimony, pg. 241) He testified that the Student's homework was above her comprehension and that he would not do her homework for her. He stated that he would explain the assignment to the Student and if she didn't understand it, he would write a note on the homework and return it to the school.

Mr. XXXX testified that he was present for the December 2011 IEP meeting at [SCHOOL 2] and it was his understanding that [SCHOOL 2] changed the Student's prior IEP because after Ms. XXXX and Ms. XXXX performed testing on the Student, they realized that the prior IEP was incorrect. (Testimony, pg. 242-243) He stated that he had visited [SCHOOL 2] and observed the Student in class where it appears that the curriculum is over her head and she's in a different world while the teaching is going on. He testified that he wants the Student to have the opportunity to succeed and improve and she is not getting that chance at [SCHOOL 2]. (Testimony pg. 243-244)

### XXXX XXXX

Ms. XXXX is the certified adaptive physical education (PE) teacher at [SCHOOL 1]. She is familiar with the Student. She testified that the Student is behind cognitively and in PE class has to receive one direction at a time. The Student could complete specific goals related to

gross motor skills. Ms. XXXX testified that the Student was in a [CLASS 1] class with a total of 6 children but she would comingle with general education for track and field days.

Ms. XXXX testified that she attended the June 9, 2011 IEP meeting in which the Student was recommended to attend [SCHOOL 2]. She testified that she knew from the IEP meeting that the Parents did not want the Student to attend [SCHOOL 2] due to the behavior of the other students in the school, so she suggested [School 3] as a placement for the Student. She suggested [School 3] because there are no general education students at the school. She testified that at the IEP meeting, the Parents were concerned with the Student's progress and the Parent's suggested [Program].

Ms. XXXX testified that in her adaptive PE class, the Student mastered locomotive skills like running, jumping, sliding, throwing and catching a ball. Ms. XXXX never observed the Student in her other classroom. Ms. XXXX described the Student as high functioning in her gross motor skills and indicated that she cognitively understands games with repetition. During the June 9, 2011 IEP, she was in agreement with providing the Student with a dedicated assistant at [SCHOOL 2] who would help the Student stay on task and follow her peers.

On cross-examination, Ms. XXXX testified that she did not feel that [SCHOOL 1] was inappropriate for the Student. She testified that the Student has friends among her similarly disabled peers and interacted well with nondisabled peers. She testified that the Student loved being around people. Ms. XXXX testified that [School 3] was not the least restrictive environment for the Student. She also stated that [Program] was too restrictive as it did not allow the Student the ability to interact with non-disabled peers.

XXXX XXXX

Mrs. XXXX XXXX is the Special Education Program Coordinator for [SCHOOL 1] and has served in that capacity for 16 years. One of her responsibilities is to review IEPs and chair IEP meetings. Mrs. XXXX testified that she was the IEP chair for the May 20, 2010 meeting and that the Student was achieving her goals or making progress towards her goals. She testified that she was in attendance for the October 19, 2011 IEP where assessments were considered and the IEP was reviewed to determine if amendments were necessary. No amendments were made to this IEP. She testified that she was not present for the December 9, 2011 IEP and it was her understanding that the IEP was amended due to changes in the Student's performance from [SCHOOL 1] to [SCHOOL 2]. Mrs. XXXX testified that the Student lost some of her skills when she was out of school from June 2011 – October 2011. Mrs. XXXX testified that the Student did not have a continuous education period from June 2011 – October 2011 and given her cognitive abilities and disabilities, the Student requires routines being repeated and continued. (Testimony pp. 55-56)

Mrs. XXXX testified that she did not work directly with the Student but that she relies on teacher' assessments of how the Student performs and work samples. The Student's teacher at [SCHOOL 1] told her that the Student was making progress.

On cross-examination, Mrs. XXXX testified that she has observed the Student and that she needs to be prompted and that the Student uses a combination of verbal and gesturing to communicate. Mrs. XXXX testified that the Student benefits from being with her non-disabled peers where she can hear language and model it. She testified that the Student is one who benefits from observing the models of other students whether they are students with disabilities or without disabilities. (Testimony pg. 70) Mrs. XXXX testified that the Parents never

complained to her that the [CLASS 1] program at [SCHOOL 1] was inappropriate for the Student. The Parents did question the Student's progress in comparison to other student's in [CLASS 1] but she explained that the Student has an IEP and her progress is based on her IEP and not by the other students in her classroom who all have different cognitive levels.

XXXX XXXX

Mrs. XXXX XXXX is a [CLASS 1] social studies teacher at [SCHOOL 2]. She has been certified in special education for four years. She testified that the Student is a very social, nice "little lady" who is always smiling. She testified that she is not the reading teacher but she knows that the Student uses PCS, repetitive teaching, and prompts to assist with lessons. The Student also uses the [Program] which is a device used to communicate with adults including her dedicated aide. Mrs. XXXX testified that the Student has a dedicated aide, Mrs. XXXX.

She testified that in social studies, she uses the State curriculum and modifies it for her students. The Students work on functional skills in her social studies class like travel packing, what's in a hotel, how to buy a ticket, etc. She testified that when the Student entered her class in October, 2011, she reviewed a snapshot of the Student's IEP. She testified the Student could not count from 1-10 or write her entire name in October 2011. In October 2011, the Student would sit in one place but now she speaks to and interacts with her disabled peers.

On cross-examination, Mrs. XXXX testified that her classroom has five students, one teacher, one paraprofessional and that the Student has a dedicated aide. She testified that the Student is receiving full adult support in class as the dedicated aide is with the Student all day. She testified that the dedicated aide gives the Student the repetition she needs to complete an assignment, assists with use of the PCS and provides hands-on assistance. She testified that the dedicated aide provides extra support for the Student during breaks such as working on her

alphabet, sounds, and writing her name. She testified that out of the five students in her class, the Student is low cognitively but not the lowest. She testified that [CLASS 1] at [SCHOOL 2] is the appropriate placement for the Student.

On cross-examination, she testified that she gives homework to the Student maybe once per week and it is not completed. When asked if the homework she is giving the Student is too difficult, she responded that she individualizes the homework for the students and she expects the Parents to give support to the Student to complete the assignment. She testified that she has not spoken to the Parents about the homework but that the dedicated aide would typically handle the communication with the Parents. She also opined that the Student benefits from being with her non-disabled peers because she needs modeling. She also testified that she has never suspected the Student of suffering from anxiety

Dr. XXXX XXXX

Dr. XXXX XXXX is the Parent's educational consultant, an expert in the field of special education. He attended IEP meetings on June 9, 2011, October 19, 2011 and December 9, 2011. Dr. XXXX testified that the IEP's from May 2010, November 2010, January 2011 and April 2011 had the same goals and objectives. (Testimony pg. 135) Dr. XXXX observed the Student in her 5<sup>th</sup> grade [CLASS 1] classroom in late May 2010. He testified that the Student was in a class with six other children in which there was a teacher and an assistant. The Student was working with an aide. The class was reviewing a grizzly bear family book. The Student was asked to point to the title on the screen, at first she pointed to the bear and then pointed to the title. The teachers were using sign language to help the Student answer questions. The aide was with the Student during the entire class. The Student was asked to point to a fish and was able to do it.

He testified that in his notes, he asked whether there had been any improvement for the Student but he did not answer the question. He observed that the Student was the least verbal in the class. She was able to recognize monosyllabic words like “to” and “go”. The Student was the most dependent in the class with regard to her need for adult support. She needed a great deal of support to cut out letters and put them in order. The Student had trouble writing her name. She needed support to write her name and she would write some of the letters backwards. The Student was a smiling, happy, friendly, loving, sweet little girl but she needed significant support to produce class work. (Testimony pp. 137-138)

Dr. XXXX testified that when he initially met with the Parents, they were concerned that the Student was not making progress academically and they were concerned about the Student’s transition to middle school. Once the Student was placed at [SCHOOL 2], the Parents were concerned that the school would not be a safe environment but that concern was remedied once the Parents and Dr. XXXX visited [SCHOOL 2] and met the staff. (Testimony, pg. 140) The biggest issue for the Parents was that in one and a half years in PGCPs, the Student had not made any meaningful progress on her IEP goals and objectives. The Parents did not want the Student to have “more of the same” at her new school, [SCHOOL 2]. Dr. XXXX testified that in May, 2010, the Student was counting intermittently to ten and in November, 2010 she was having problem counting beyond ten. In May, 2010, the Student was having problems with sound-symbol association and letter identification and one and a half years later, she was having the same problem. (Testimony pp. 141-143).

At the June 9, 2011 IEP meeting, there was a lot of discussion regarding whether the Student had made meaningful progress. The Parents and Dr. XXXX did not agree with the PGCPs assessment of the Student’s progress or the placement at [SCHOOL 2]. Dr. XXXX

testified that the Student attended ESY during the summer of 2011. He also testified that the Parents did not send the Student to [SCHOOL 2] when school started in September 2011. He testified that the Parents were not in agreement with the placement and did not want to send the Student to [SCHOOL 2] until they knew that it would be a safe environment for her. (Testimony pg. 146)

At the Central IEP meeting on October 19, 2011, he testified that he hoped to convince the team that the Student had not made been making progress in her educational program and to refer the Student to [Program]. (Testimony pg. 150) The Central IEP did not modify the placement so the Parents' agreed to place the Student at [SCHOOL 2] and requested that additional assessments be performed on the Student to see if in fact she had made progress. Another IEP meeting was held on December 9, 2011 after the assessments of the Student were performed at [SCHOOL 2]. Dr. XXXX testified that the team at [SCHOOL 2] agreed that the previous IEPs were not appropriate for the Student and that she had not made progress while at [SCHOOL 1]. (Testimony pg. 155) He testified that the team continued to recommended [SCHOOL 2] and he and the Parents were not in agreement.

Dr. XXXX testified that the [Program] is one of a few private special education programs in Maryland that has expertise and specific knowledge to be successful for the Student. (Testimony pg. 156) Dr. XXXX testified that the [Program] would be an appropriate placement for the Student because of the low staff to student ratio with staff that is specifically trained to work with children with her diagnostic profile. [Program] also has a lot of related services that are integrated into the classroom. He testified also that there are teachers at [Program] who are certified in sign language. (Testimony pg. 158)

Dr. XXXX testified that in November, 2011, he observed the Student in class at [SCHOOL 2] with Ms. XXXX. He testified that the class was a lecture style class and the pace of the instruction was inappropriate for the Student. The Student was working with an aide but was not receiving differentiated instruction. The Student did not seem to be tracking the class. He testified that he did not observe the Student utilizing any high-tech communication devices during his observation. (Testimony pg. 159) Dr. XXXX testified that he specifically saw the Student counting objects with hand over hand assistance counting to seven. She was working with the aide the entire class. The Student was working on copying her name and address He testified that his escort for the November, 2011 observation at [SCHOOL 2] was Mrs. XXXX and that Mrs. XXXX “grudgingly agreed” that the lesson he observed was inappropriate for the Student. (Testimony pg 160-161).

Dr. XXXX opined that the [SCHOOL 2] program is not an appropriate program for the Student. He opined that the Student needs something very different, a more intensive environment so that she can make progress. Dr. XXXX opined that the Student has not made progress in two years. (Testimony pg. 164). Dr. XXXX opined that the Student will have more opportunity for a peer group at [Program]. He did not see the benefit of the Student being exposed to her nondisabled peers socially or academically. (Testimony pg. 165)

On cross examination, Dr. XXXX testified that he specializes mostly in children with emotional or behavioral disorders and that the Student in this matter does not have an emotional or behavioral disorder. (Testimony pg. 169) During cross examination, Dr. XXXX was asked whether he was acting as an advocate for the Parents or was he an unbiased expert for this due process hearing. Dr. XXXX testified that he was acting as an expert and explained that when he is hired as an independent consultant, he reviews the records and looks at the case and there have

been times when he has told parents to go in a different direction. In this case, he believed in the Parent's position. (Testimony pg. 171)

On cross-examination, Dr. XXXX testified that he has not observed the Student act in an anxious manner and he testified that the Student is cared for and protected at [SCHOOL 2]. (Testimony pg. 176). Dr. XXXX testified on cross-examination that he never evaluated the Student or prepared any formal observation reports. His opinions are based on reviewing documents, observing the Student in class at [SCHOOL 1] and [SCHOOL 2] and attending three IEP meetings. (Testimony pg. 178) Dr. XXXX's conversation with Mrs. XXXX at [SCHOOL 2] invoked a lengthy line of questioning at the hearing and in the end, Dr. XXXX testified that Mrs. XXXX agreed that the lesson they observed in November, 2011 was "not a good lesson". Dr. XXXX admitted that his conversation with Mrs. XXXX was very short and that she did not state that [SCHOOL 2] was inappropriate for the Student. (Testimony pg. 188) No one at either school expressed that the Student was not making meaningful progress to Dr. XXXX.

On cross-examination, Dr. XXXX was questioned about the two months of school missed by the Student in the beginning of the 2011-2012 school year. Dr. XXXX testified that the Parents did not receive approval to home school the Student and no specific curriculum was used by the Parents to home school the Student. He also testified that there would be some regression from her missing two months of school and one week of ESY but no significant harm was done to the Student. (Testimony pp. 215-217)

#### FAPE Analysis

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to "[t]he best education, public or nonpublic, 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 (4<sup>th</sup> Cir. 1983). Instead, a FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 207. A finding that a child is not progressing at the same speed as his other peers does not shed any light on whether a child has failed to gain educational benefit. As discussed in *Rowley*, what constitutes educational benefit for two different children may differ dramatically, depending on the disabilities that are present. *Id.* at 202.

Therefore, “educational benefit” requires that “the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200. *See also MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4<sup>th</sup> Cir. 2002), *citing Rowley*, 458 U.S. at 207; *see also A.B. v. Lawson*, 354 F.3d 315 (4<sup>th</sup> Cir. 2004). Thus, the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990). Yet, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182-3 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *see also Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6<sup>th</sup> Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Bd. of Educ. of Frederick County v. Summers*, 325 F.Supp.2d 565, 576 (D.Md. 2004).

The Court of Appeals for the Fourth Circuit has recognized that 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 the Student to receive appropriate educational benefit. *See In re Conklin*, 946 F.2d 306, 316 (4<sup>th</sup> Cir. 1991); Md. Code Ann., Educ. § 8-403 (2008). The IEP is the tool for providing necessary services to the disabled child. 20 U.S.C.A. § 1414(d) (2010).

Furthermore, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.” *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4<sup>th</sup> Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).<sup>15</sup>

Based on the foregoing evidence including testimony presented by the Parents, Mrs. XXXX, Mrs. XXXX, Mrs. XXXX and Dr. XXXX XXXX, I find that there was insufficient evidence to prove that a FAPE was not provided for the Student during the 2010-2011 and 2011-2012 school years.

#### FAPE 2010- 2011 School Year

The Parents contend that the IEP utilized during the 2010-2011 school was inappropriate for the Student and failed to allow her to make meaningful progress. The IEP depicts the Student’s current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the Student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I-V).

The IEP is the core of the cooperative process between parents and schools. It is the central vehicle for collaboration. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). IEP teams *must consider* the students’ *evolving needs* when developing their educational programs. Each IEP must include an assessment of the child’s current educational performance, must articulate

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<sup>15</sup> The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997).

measurable educational goals, and must specify the nature of the special services that the school will provide. *Id.*

The testimony presented by the Parents in this matter lacked any detail with regards to what they expected with regards to progress for the Student. The testimony was limited and other than indicating that they will not do the Student's homework for her, there was no indication that the Student was getting similar support at home for assignments as she was getting in school for assignments. The record is very clear that the Student has an intellectual disability which places her below the 1<sup>st</sup> percentile of similarly aged children and that she cannot complete school tasks or homework independently. The Parent's conclusion that FAPE has not provided during the 2010-2011 school year, based on homework assignments and the quality of those assignments is misplaced. The Student's lack of success with homework it is not an accurate gauge since in school the Student has a continuum of supports to complete assignments. Also, there was testimony by Mrs. XXXX that the Parents were comparing the Student's progress to other disabled students in the [CLASS 1] classroom. The Parents may have seen a different level of progression in other Students, however, each of the children in the Student's class has an IEP and they are all on different cognitive levels. The Student's progress cannot be compared to anyone else's progress as she is assessed according to her IEP only.

The IEP's for the 2010-2011 school year had identical goals and objectives and the only area where the Student was not making progress or had not achieved her goal was in the area of fine motor skills. (Bd. Ex. 6, pg. 14) The IEP's for the 2010-2011 school show marked progress in the Student's ability to match upper and lower letters (Aa-Ff), write her name with a model, reading words with the assistance of PCS, comprehension skills, counting to eleven independently, matching patterns, tracing letters and self management. (Findings of Fact #21 and

#26) However, the staff at [SCHOOL 1] made it clear that many of these tasks are accomplished with numerous verbal prompts, modeling and other assistance. The Student is unable to work independently on her goals due to her cognitive level.

The issue of high tech technology was raised by the Parents as something that was missing from the PGCPS. However, the record is clear that the Student utilized the following technology during the 2010-2011 school year to assist in lessons and tasks: PCS, [Program] and the [Program 2] computer program utilized for reading. (Bd. Ex. 6, pg.9)

The Parents did not prove that there was no meaningful academic progress made by the Student during the 2010-2011 school year while she was attending [SCHOOL 1]. The Parent's academic consultant, Dr. XXXX observed the Student in her class at [SCHOOL 1] and did not testify that the class was inappropriate. He testified to all of the supports the Student was receiving during class. The record shows progress academically and the testimony from Mrs. XXXX supports that meaningful progress was made by the Student during the 2010-2011 school year.

At the April 29, 2011 IEP meeting, it was recommended by the team that the Student attend [SCHOOL 2] and be placed in a [CLASS 1] class with a dedicated assistant and pull-out speech therapy. (Bd. Ex. 9, pg. 15) The Parent's disagreed with placement at [SCHOOL 2] and voiced their concerns about what would be different at [SCHOOL 2] to assist the Student in mastering her goals. Mastering goals and making progress towards goals are two different concepts. It is possible that the Student may never master the goals that have been put in place for her through the IEP process but it is important to note that the IEP is an evolving document that is amended based on present levels of performance. Progress towards a goal is one step closer to mastery and it is important that progress is rewarded for this Student.

FAPE is satisfied when a child's IEP is designed to allow the child to receive educational benefit. *Rowley*, 458 U.S. at 203. I find the Parents failed to prove that the 2010-2011 IEP was not reasonably calculated to enable the Student to receive meaningful educational benefit in the least restrictive environment. Therefore, the Student's 2010-2011 IEP and placement provided a free, appropriate, public education.

*FAPE 2011-2012 School Year*

The Parent's contend that FAPE has not been provided for the 2011-2012 school year based on the placement decision and a lack of meaningful progress towards the Student's IEP goals. The Parents, Parents' counsel and Dr. XXXX stated that sending the Student to [SCHOOL 2] and placing her in a [CLASS 1] classroom was "more of the same" interventions she received at [SCHOOL 1] and that the [CLASS 1] Program at [SCHOOL 1] did not provide the Student with a FAPE. The Parents also testified that [SCHOOL 2] in December 2011 agreed that the prior IEP from the 2010-2011 school year was incorrect which is why they changed the IEP in December 2011.

On direct examination, Dr. XXXX stated that Mrs. XXXX "grudgingly agreed" that the lesson he observed the Student in at [SCHOOL 2] was not a good lesson. From that observation, Dr. XXXX came to the conclusion that the [CLASS 1] program at [SCHOOL 2] was inappropriate for the Student. On cross-examination of Dr. XXXX, it was clarified that no staff at [SCHOOL 2] expressed to Dr. XXXX that [SCHOOL 2] was an inappropriate placement for the Student.

There was testimony provided by Mrs. XXXX that the IEP in December, 2011 was changed due to a change in the Student's present level of performance and regression that occurred throughout the summer and early fall of 2011 while the Student was in an educational

setting. As previously established, the IEP is an evolving document that must be modified to provide the Student with a FAPE. In December 2011, after evaluating and assessing the Student at [SCHOOL 2], her IEP was amended with new goals and objectives.

There was some testimony during the Parents' case about regression. Mrs. XXXX referenced the psychological assessment provided by XXXX XXXX of the PGCPS and concluded that the Student suffered regression during the Summer of 2011 and the first two months of the 2011-2012 school year when she was not in school. On page four of the psychological assessment, Mr. XXXX writes, "(The Student) will benefit from as much practice, drill, review and repetition as can be built into a learning situation. Utilize short periods of work time along with increased feedback and generous doses of praise and reinforcement . . . A means of communicating between school and home is recommended so (the Student) can practice skills at home and in other settings other than school. The use of a consistent home-school notebook system is encouraged." (Bd. Ex. 1, pg. 4) In the April 29, 2011 IEP, the team indicated that regression during the summer and school breaks was a possibility. The team wrote that the "Student needed continued and frequent practice with learned skills in order to maintain what she has learned and that it is likely that the Student will experience substantial regression during the normal school break and may not recover skills within a reasonable time." (Bd. Ex. #9, pg. 22) The Student's teacher at [SCHOOL 2], Mrs. XXXX, agreed that the Student regressed during the summer of 2011 and the first two months of the 2011-2012 school which caused modifications to the Student's IEP in December 2011. Dr. XXXX agreed that the Student experienced some regression, but he also stated that it was not be significant regression as the Parents were working with the Student at home. The Student attended a portion of the four-week ESY during July of 2011, but she still missed organized educational training for part of June, August, September and

the majority of October 2011. There is no responsibility on the Parents to provide supplemental education or assist with the duty of the PGCPS to provide a FAPE for their child; therefore, I am not placing any blame on the Parents for the Student's normal regression during the Summer of 2011 and the additional regression for the Fall of 2011.

The Parents failed to provide sufficient testimony that the changes in the December 2011 IEP was due to an inappropriate IEP and therefore constitutes a lack of a FAPE for the Student which would make the Student eligible for compensatory education and/or private placement. Dr. XXXX observed the Student in class one time at [SCHOOL 2] and indicated that he did not observe her using any high tech communication devices, that the class lecture style and the pace was inappropriate for the Student. He also testified that there was no differential instruction. However, his testimony was strongly refuted by the Student's teacher, Ms. XXXX who testified that the student received individualized instruction, homework and constant assistance, prompting and redirection from her dedicated aide. Also, the Student's progress under the IEP established on December 9, 2011, clearly shows that the Student is making meaningful progress with the amended objectives and goals established by [SCHOOL 2]. (Bd. Ex. 21, pp. 31-33) (Finding of Fact #54).

There is overwhelming evidence contrary to the Parent's contention that the Student's 2011-2012 IEP and the placement at [SCHOOL 2] were inappropriate and failed to provide a FAPE. All of the witnesses who testified in the Student's case-in-chief, other than their expert, testified that the Student was provided a FAPE in 2010-2011 and 2011-2012 school years, that the IEP's established sufficient goals and objectives under which the Student made meaningful progress and that the Student's placement at [SCHOOL 2] was appropriate. I find the Parents failed to prove that the 2011-2012 IEP was not reasonably calculated to enable the Student to

receive meaningful educational benefit in the least restrictive environment. Therefore, the Student's 2011-2012 IEP and placement provided a free, appropriate, public education.

### **SUMMARY**

In summary, PGCPs' Motion for Judgment is granted with regard to the issue of whether PGCPs failed to provide the Student a FAPE for the 2010-2011 school year due to lack of meaningful progress towards IEP goals and the 2011-2012 school year because the proposed placement at [SCHOOL 2] cannot meet the Student's alleged need for increased staffing, assistive technology supports (specifically an iPad), integrated related service supports, a smaller class and the same daily schedule. I have found that the Parents failed to prove that [SCHOOL 2] does not have the ability to provide the Student with a FAPE.

### **Alleged Procedural Violations**

In their due process complaint, the Parents allege various procedural violations: (1) the PGCPs' alleged failure to properly consider all information provided to the IEP team, including information provided by the Parents and their educational consultant when developing the 2011-2012 IEP, (2) PGCPs's alleged failure to include the Parents as equal participating member of the IEP team when developing the 2010-2011 and 2011-2012 IEP's and (3) PGCPs alleged failure to offer the Student appropriate ESY services for the Summer of 2011.

During their case-in-chief, the Parents did not provide any specific testimony or cite any authority regarding any of these procedural violations. Therefore, I find that the Parents have not met their burden with regards to any of the procedural violations alleged.

#### **Failure to Consider all Information**

The Parents did not cite the authority on which they relied with regard to their allegation that PGCPs failed to properly consider all information provided to the IEP team, including but

not limited to information provided by the Parents and their educational consultant; however, I note that COMAR 13A.05.01.08B provides that in developing an IEP, the IEP team shall periodically meet to review and revise the IEP, as appropriate, to “address any information about the student provided to or by the parent.”

The record established by the Parents clearly shows that the IEP meetings that took place on November 15, 2010, April 29, 2011, and June 9, 2011 were held to address the concerns of the Parents. Also, Central IEP meetings were held on October 19, 2011 and December 9, 2011 to address the concerns of the Parents and their educational consultant. The Parent’s educational consultant began attending IEP meetings in June, 2011, however, there was no formal report prepared by the consultant for the IEP’s consideration.

In addition, the IEP notations indicate that the Parents’ requests regarding changes to the goals and objectives were considered and the goals and objectives revised after reevaluation of the Student in December, 2011. The Parents main complaint during the IEP meeting was placement at [SCHOOL 2] and the PGCPs disagreed that private placement at [Program] was appropriate and the least restrictive environment for the Student. There is a difference between disagreeing with information provided and failing to consider it.

*Failure to Include Parents as Equal Participating members of IEP Team*

The IEP is to be developed jointly by a school official qualified in special education, the Student’s teacher, the parents or guardian, and, where appropriate, the child. In several places, the IDEA emphasizes the participation of the parents in developing the Student’s educational program and assessing its effectiveness. *Burlington*, 471 U.S. at 368, citing §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 C.F.R. § 300.332.

For the following reasons, I find that the Parents failed to prove by a preponderance of the evidence that they were not allowed meaningful participation in the IEP process.

The PGCCPS IEP documents show that one or both of the Parents participated in every IEP meeting held in 2010 and 2011 and that the Parents, their attorney and their educational consultant (once retained) participated in meetings during which the Student's IEPs were discussed and developed. This matter proceeded to two Central IEP meeting with the presence of the Parents, their attorney and educational consultant and the notes clearly indicate that the statements made by them were considered when developing the Student's IEP. (Bd. Ex. #21)

ESY Summer 2011

The Parents asserted that the Student was not provided appropriate ESY services in 2011. Each public agency must ensure that extended school year services are available as necessary to provide FAPE. 34 CFR 300.106 (a)(1).

The Parents' evidence included the April 29, 2011 IEP, as well as testimony from Dr. XXXX and Mrs. XXXX, all of which indicate that the Student was found eligible for ESY for the Summer of 2011 and attended a portion of the ESY program which was scheduled from July 5, 2011 – July 28, 2011. In this matter, the Student was not refused ESY services and therefore I find that the Parents have failed to meet their burden with regards to this allegation.

**CONCLUSIONS OF LAW**

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

- 1) PGCCPS Motion for Judgment must be granted with regard to the issue of whether PGCCPS failed to provide the Student a FAPE for the 2010-2011 school year.

2) PGCPS' Motion for Judgment must be granted with regard to the issue of whether PGCPS failed to provide the Student a FAPE for the 2011-2012 school year because placement at [SCHOOL 2] cannot meet the Student's educational needs and the Student failed to make meaningful progress. *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S.359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); 34 C.F.R. § 300.148; COMAR 28.02.01.12E;

3) PGCPS did not fail to properly consider all information at the IEP meetings, including information provided by an educational consultant and the Parents, in developing the Student's IEP for the 2011-2012 school year. COMAR 13A.05.01.08B;

4) PGCPS did not fail to include the Parents as equal participating members of the IEP team when developing the Student's IEP's for the 2010-2011 and 2011-2012 school year. *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S.359 (1985); 20 U.S.C.A. §§1400(c); 1401(19), 1412(7), 1415(b)(1)(A), (C)-(E), and 1415(b)(2); 34 C.F.R. 300.345;

5) PGCPS did not fail to offer the Student appropriate ESY services for Summer 2011. COMAR 13A.05.01.03B(26);

6) The Parents are not entitled to compensatory education for the 2010-2011 school year. Compensatory education is available when an educational agency fails, over a period of time, to provide a student with FAPE. *G. v. Fort Bragg Dependent Schools*, 343 F.3d. 295, 309 (4<sup>th</sup> Cir. 2003). Since I have found that the Parents did not prove a denial of FAPE at any time, compensatory education is not available.

7) The Parents request for reimbursement of attorneys' fees and costs is denied. The IDEA permits a court to "award reasonable attorneys' fees as part of the costs" to prevailing parents. See 20 U.S.C.A. § 1415 (i)(3)(B) (2007). A Due Process hearing under the IDEA is not

a court proceeding, however, and there are no provisions at the Due Process hearing level for the award of attorneys' fees. Even if the Parents had prevailed in this case, therefore, their request for attorneys' fees still would have had to be denied.

**ORDER**

I **ORDER** that PGCPS' Motion for Judgment is **GRANTED**; and I further

**ORDER** that the Parents' request for compensatory education and/or private placement based on alleged procedural violations is **DENIED**; and I further

**ORDER** that the Parents' request for reimbursement of attorneys' fees and costs is **DENIED**.

April 19, 2012  
Date Decision Mailed

\_\_\_\_\_  
Tameika Lunn-Exinor  
Administrative Law Judge

TLE/kkc

**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.