

XXXX XXXX

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

* BEFORE NANCY E. PAIGE
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
 * OAH NO.: MSDE-MONT-OT-12-11607

* * * * *

DECISION

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STATEMENT OF THE CASE

On March 20, 2012, XXXX (Mother) and XXXX (Father) XXXX (collectively, Parents), on behalf of 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 the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

A Resolution Meeting was held on April 16, 2012, but the parties were not able to resolve the dispute. MCPS sent the OAH a Notice of Outcome of Resolution Meeting by facsimile on April 23, 2012.

I held telephone prehearing conferences on May 7 and 18, 2012. Michael Eig, Esquire represented the Parents. Jeffrey Krew, Esquire, represented MCPS. Based on the availability of the parties and their witnesses, I scheduled a hearing for July 18-20, 2012.

The hearing dates requested by the parties fell more than 45 days after the April 23, 2012 Notice of Outcome of Resolution Meeting. As such, a decision could not be issued within 45 days pursuant to 34 C.F.R. §§ 300.510(b)-(c), 300.515(a) (2010). The parties waived the 45-day requirement and agreed that I would issue my decision within 30 days from the close of the record, or August 20, 2012. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2008).

I conducted a hearing as scheduled, on the three consecutive days, and the record closed on July 20, 2012. Michael J. Eig, Esquire, represented the Parents. Jeffrey A. Krew, Esquire, represented the MCPS. At the close of the Parents' case, MCPS made a Motion for Judgment (Motion). Code of Maryland Regulations (COMAR) 28.02.01.12E. I reserved ruling on the Motion until the time I issued 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) (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and COMAR 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. 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 MCPS' Motion for Judgment be granted?
2. Is the Student's February 21, 2012 Individualized Education Program (IEP) reasonably calculated to provide the Student with a FAPE for her fifth grade year?

SUMMARY OF THE EVIDENCE

Exhibits

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

- P- 1. Request for Due Process Hearing, 3-20-2012
- P- 2. PEP Developmental Profile, 3-5-2007
- P- 3. PEP Psychological Evaluation Report, 3-19-2007
- P- 4. MCPS IEP, 3-22-2007
- P- 5. [School 1] Progress Report for Reading, 11-3-2008
- P- 6. [School 1] Progress Report for Math, 11-3-2008
- P- 7. [School 1] Primary Interim Report, 2-27-2009
- P- 8. MCPS IEP Goals, 3-5-2009
- P- 9. [School 1] Progress Report for Math, 6-11-2009
- P- 10. [School 1] Progress Report for Reading, 6-11-2009
- P- 11. [School 1] Progress Report for Math, 11/9-1/10
- P- 12. [School 1] Primary Interim Report, 12-9-2009
- P- 13. [School 1] Primary Interim Report, 2-26-2010
- P- 14. Letter to Ms. XXXX from Mr. and Mrs. XXXX, 3-5-2010
- P- 15. MCPS IEP, 3-17-2010
- P- 16. XXXX XXXX, Neuropsychological Evaluation, 3-31-10
- P- 17. XXXX Therapy Center Speech/Language Evaluation,
4-20-2010
- P- 18. [School 1] Primary Interim Report, 5-17-2010
- P- 19. [School 1] Progress Report for Reading, June 2010
- P- 20. [School 1] Progress Report for Math, June 2010

- P- 21. MCPS Review of Non-MCPS Educational Assessment Report, 6-7-2010
- P- 22. MCPS Review of Non-Public Speech-Language Assessment, 6-10-2010
- P- 23. MCPS Report of School Psychologist Review of Non-MCPS Evaluation,
6-14-2010
- P- 24. MCPS IEP, 6-17-2010
- P- 25. [School 1] Report Card, 6-18-2010
- P- 26. Letter from Dr. XXXX XXXX, MS OTR/L, 7-8-2010
- P- 27. MCPS Occupational Therapy Evaluation, 7-9-2010
- P- 28. Letter to Zvi D. Greismann, Esq., from Anjali Prakash, Esq., 8-31-2010
- P- 29. Letter to Anjali Prakash, Esq., from Edmund W. Law, Esq., 9-1-2010
- P- 30. Letter to Dr. XXXX XXXX from Anjali Prakash, Esq., 9-8-2010
- P- 31. Letter to Edmund W. Law, Esq., from Anjali Prakash, Esq., 9-9-2010
- P- 32. Letter to Zvi D. Greismann, Esq., from Anjali Prakash, Esq., 9-21-2010
- P- 33. Letter to Edmund W. Law, Esq., from Anjali Prakash, Esq., 9-30-2010
- P- 34. Letter to Anjali Prakash, Esq., from Edmund W. Law, Esq., 10-5-2010
- P- 35. Elementary Teacher IEP Report, 12-8-2010
- P- 36. MCPS Grade 3 Progress Report, 1-21-2011
- P- 37. MCPS 3rd Grade 2nd Quarter Report Card, 1-25-2011
- P- 38. Occupational Therapy Discharge Summary, 2-8-2011
- P- 39. Elementary Teacher IEP Report, 2-9-2011
- P- 40. Educational Assessment Report, 3-22-2011
- P- 41. MCPS Classroom Observation, 3-22-2011
- P- 42. MCPS IEP, 4-5-2011

- P- 43. XXXX Educational Evaluation Report, 5-19-2011
- P- 44. Letter to Mr. and Mrs. XXXX from XXXX XXXX, 6-2-2011
- P- 45. Review of Non-MCPS Educational Assessment Report, 6-6-2011
- P- 46. XXXX Dyslexia Education Center Summer Progress Report, 8-2-2011
- P- 47. Letter to Mr. XXXX from XXXX XXXX, 9-25-2011
- P- 48. Emails between XXXX XXXX and Michael J. Eig, Esq., 10-1-2011
- P- 49. Not admitted
- P- 50. Letter to Michael J. Eig, Esq., from Jeffrey A. Krew, Esq., 10-4-2011
- P- 51. Letter to Mr. XXXX from Mr. and Mrs. XXXX, 10-22-2011
- P- 52. MCPS Student Progress Report, 1-25-2012
- P- 53. Letter to Mr. and Mrs. XXXX from XXXX XXXX, 1-27-2012;
- P- 54. Letter from Dr. XXXX XXXX, 1-31-2012
- P- 55. Emails between XXXX XXXX and XXXX XXXX, 1-31-2012
- P- 56. Prior Written Notice and IEP meeting notes, 2-21-2012
- P- 57. MCPS IEP, 2-21-2012
- P- 58. Letter to XXXX XXXX from Michael J. Eig, Esq., 3-20-2012
- P- 59. Letter to Michael J. Eig, Esq., from Jeffrey A. Krew, Esq., 3-21-2012;
- P- 60. Letter to Michael J. Eig, Esq., from Alison Steinfelds, Esq., 3-22-2012
- P- 61. Letter to XXXX XXXX from XXXX XXXX, 4-11-2012
- P- 62. Not admitted
- P- 63. Due Process Resolution Meeting Tracking Form, 4-16-2012
- P- 64. Letter to Zvi D. Greismann, Esq., from Michael J. Eig, Esq., 4-26-2012
- P- 65. Not admitted

- P- 66. Letter to Michael J. Eig, Esq., from Jeffrey A. Krew, Esq., 5-9-2012
- P- 67. MCPS Grade 4 Progress Report, 6-11-2012
- P- 68. Mathematics Grade 4-5 Unit Assessments End of Year Report, 6-11-2012
- P- 69. Letter from XXXX XXXX, 6-12-2012
- P- 70. XXXX XXXX Academic Therapy Report, June 2012
- P- 71. Student Work Sample
- P- 72. Resume of XXXX XXXX
- P- 73. Resume of Dr. XXXX XXXX

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

Board Ex. No.	Date	Description
1	6/7/10	Review of Non-MCPS Educational Assessment - XXXX XXXX, Special Education Resource Teacher
2	6/10/10	Review of Non-Public Speech-Language Assessment - XXXX XXXX
3	6/14/10	Report of School Psychologist/Review of Non-MCPS Evaluation - XXXX XXXX, M.A., NCSP
4	6/15 & 17/10	IEP Team Meeting Documentation
5	9/21/10	IEP Team Meeting Documentation
6	2/23/11	Letter to Michael Eig from Edmund Law
7	2/28/11	Letter to Parents from XXXX XXXX
8	3/11	MSA Scores
9	3/18/11	Parent Report
10	3/22/11	Classroom Observation - XXXX XXXX, Special Educator
11	3/22/11	Educational Assessment - XXXX XXXX, Special Educator
12	6/6/11	Review of Non-MCPS Educational Assessment - XXXX XXXX, Special Educator
13	6/14/11	IEP Team Meeting Documentation
14	8/19/11	Request for Due Process Hearing

Board Ex. No.	Date	Description
15	9/28/11	Letter to Michael Eig from Sharon Gooding
16	9/29/11	Due Process - Resolution Mtg - Tracking Form
17	10/3/11	Letter to Jeff Krew from Michael Eig
18	11/2/11	Letter to OAH from Michael Eig
19	11/3/11	Letter to Parties from OAH
20	1/26/12	Student Observation Report – XXXX XXXX
21	1/26/12	Classroom Observation - XXXX XXXX, Special Educator
22	1/27/12 - 1/31/12	Email between Mother and XXXX XXXX
23	2/21/12	IEP Team Meeting Documentation
24	3/7/12 - 3/14/12	Emails between Mother and XXXX XXXX
25	3/15/12	Emails between XXXX XXXX and Mother
26	3/20/12	Request for Due Process Hearing
27	3/21/12	Email to XXXX XXXX from Mother
28	8/11 - 3/12	Read Naturally Data
29	3/28/12	Academic Student Profile
30	9/8/11 - 3/30/12	Speech-Language Documentation Log - XXXX XXXX, MA, CCC- SLP
31	3/30/12	Letter to Michael Eig from Jeff Krew
32	5/4/12 - 5/6/12	Email between XXXX XXXX and Mother
33	11-12 S.Y.	Work Samples
34	10/3/11 - 5/30/12	Student's Daily Contract
35	6/14/12	4 th Grade Report Card
36		XXXX XXXX Curriculum Vitae
37		XXXX XXXX Curriculum Vitae

Board Ex. No.	Date	Description
38		XXXX XXXX Curriculum Vitae
39		XXXX XXXX Curriculum Vitae
40		XXXX XXXX Curriculum Vitae
41		XXXX XXXX Curriculum Vitae
42		XXXX XXXX Curriculum Vitae
43	5/19/11	XXXX XXXX's Notes of May 19, 2011 Observation
44	4/5/11	IEP Team Meeting Documentation
45	6/1/10	IEP Team Meeting Documentation
46	5/19/11	XXXX XXXX's Notes of Ms. XXXX's Lesson on Simile
47		Not Admitted

Testimony

The Parents presented the following witnesses:

- The Student's Mother
- The Student's Father
- XXXX XXXX, accepted as an expert in special education
- Dr. XXXX XXXX, accepted as an expert in school psychology

The MCPS presented the following witnesses:

- XXXX XXXX, MCPS Special Education Supervisor, accepted as an expert in special education.
- .XXXX XXXX, accepted as an expert in school psychology
- XXXX XXXX, accepted as an expert in special education
- XXXX XXXX

FINDINGS OF FACT

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

1. The Student is a ten-year-old special education student of MCPS. She will be in the fifth grade for the 2012-2013 academic year.
2. The Student has been diagnosed with multiple learning disabilities, including Receptive/Expressive Language Disorder, a visual-motor integration deficit, a developmental coordination disorder, Attention Deficit Hyperactivity Disorder (ADHD), dyslexia,¹ dyscalculia,² dyspraxia³/graphomotor output disorder, generalized anxiety disorder, and executive function disorder.
3. Notwithstanding her disabilities, the Student has average cognitive ability.
4. The Woodcock-Johnson Tests of Achievement, III (WJ III) were administered to the Student on March 18, 2010, March 17, 2011 and May 5, 2011. A different person administered the test in each instance, and on each testing the Student showed progress in all areas.
5. On the WJ III administered privately on May 5, 2011, toward the end of her third-grade year, the Student demonstrated low average ability on her total achievement.

Her scores fell in the following ranges:

Broad reading	average
Decoding skills	average
Reading fluency	average

¹ “[I]nability to read, spell and write words, despite the ability to see and recognize letters. . . .” Dorland’s Illustrated Medical Dictionary, 31st Edition. Saunders (2007).

² “[I]mpairment of the ability to do mathematical problems because of brain injury or disease.” Id.

³ “[P]artial loss of ability to perform coordinated acts.” Id.

Passage comprehension	low average
Word attack	low average
Broad math	average
Applied problems	average
Quantitative concepts	average
Math fluency	low average
Math calculation	low
Broad written language	low
Writing sample	average
Spelling	low average
Writing fluency	very low

10. On the Roe Burns Informal Reading Inventory, 7th Edition, also administered on May 17, 2011, the Student performed as follows:

First grade passage: Comprehension 62.5%, word recognition 95%

Second grade passage: Comprehension 62.5%, word recognition 95%

Third grade passage: Comprehension 40%, word recognition 90%

On all three passages, the Student correctly answered questions that involved cause and effect with inferences and details, but reached a frustration level indicating that the material was too difficult for her.

11. The Student has attended [School 2] in the [Program] ([PROGRAM]) program since the beginning of the third grade. She is on track for, eventually, a high school diploma.

12. In order to be in the [PROGRAM] program, students must require over fifteen hours of special education (whether self-contained or in the general education classroom), up to a

maximum of thirty hours, which is the full day. Most students in the program take lunch and recess in the general education setting, so generally the maximum number of special education hours for [PROGRAM] students is twenty-five.

13. As a result of her disabilities, the Student is slow in performing virtually all academic activities. She is also slow in processing spoken language, which includes following directions.
14. Because of her disabilities, particularly problems in expressing herself, the Student has difficulty interacting with her peers. She has only one friend, who is in the same school but not in her class. Nonetheless, she is generally emotionally comfortable in school.
15. The Student is in a modified physical education class because of deficiencies in her motor skills. She cannot engage in playground games.
16. The Student is able to use a computer to access a program designed for her use and to work independently at the computer. She raises her hand in the general education class and is able to participate to some extent.
17. A number of supports and aides are available to the Student to assist her in accessing education. These include a human reader for tests, a scribe, a one-on-one aide, a math calculator, extra time, and graphic organizers.
18. The Student's most recent IEP, February 21, 2012, reduced the time for special education outside of general education called for in her prior IEP (June 14, 2011) from ten to five hours; continued ten hours of special education in the general education classroom; and reduced from one hour to forty-five minutes the amount of speech/language therapy.

19. In addition to supports in school, the Student has a private academic therapist three times a week. In June 2012, her academic therapist reported “steady, measurable gains in all aspects of academic therapy.” Ex. P-70.
20. The Student’s parents provide intensive support for her in doing her homework. She works independently on math, but requires substantial assistance with reading, writing and spelling.
21. On her fourth grade report card, the Student received grades of A and B in her non-math academic subjects, with the exception of spelling, for which she received a C. In math, she was graded outstanding in concepts and satisfactory in computation and problem solving.
22. In March 2012, the Student participated in a class program presented to her class and to other students at her school and at [School 3] in which she played the role of XXXX XXXX. The project required her to write a speaking part and to act it out, including singing, before an audience.
23. In the fourth grade, the Student exhibited substantial progress in the classroom in her reading and writing skills.
24. The Student’s scores on the Measures of Academic Progress – Reading (MAP-R) reading test rose from 176 in September 2010, to 181 In January 2011, and 187 in May 2011. In the fall of 2011, the Student’s score was 189; toward the end of the fourth grade it was 198.
25. The MAP-R is performed on the computer without assistance. A gain of eight to ten points is considered a full year’s growth in reading. The target score for students at the end of third grade is 200.

26. By the end of the fourth grade, the Student was able to write a five-sentence story that made sense, with a beginning, middle and end.
27. During the first two quarters under the Student's June 14, 2011 IEP, she was making sufficient progress to meet all goals. A new IEP was developed on February 21, 2012. Under the new IEP, she was making sufficient to meet all goals through June 12, 2012. The time provided for meeting goals under this IEP is February 2013.

DISCUSSION

The Legal Framework

The IDEA governs the identification, assessment, and placement of students in special education. 20 U.S.C.A. §§ 1400-1487 (Supp. 2007), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2007) and COMAR 13A.05.01. The IDEA provides that all students with disabilities have the right to a "free, appropriate public education" (FAPE). 20 U.S.C.A. § 1412.

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

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

458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures

set forth in the IDEA; second, there must be a determination as to whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-207. (There is no issue involving procedural compliance in this case.)

An IEP is the “primary vehicle” through which a school provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP “must contain statements concerning a disabled child’s level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress.” *M.M. v. School District of Greenville County*, 303 F. 3d 523, 527; see 20 U.S.C.A. § 1414(d)(1)(A).

To provide a FAPE, the student’s educational program must be tailored to the student’s particular needs and take 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
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3)(A) (2010).

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 a student in meeting those objectives, and indicates the extent to which a student will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A).

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*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).⁴

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, a student must be placed in the least restrictive environment (LRE) to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. *Id.* and 34 C.F.R. § 300.114(a)(2). The “mainstreaming” requirement is “not an inflexible federal mandate.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). In such a case, a FAPE might require placement of a child in a more restrictive environment, including a private school setting that would be fully funded by the child’s public school district. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, in this matter, the Parents have the burden of proving that the Student’s IEP is not reasonably calculated to provide educational benefit to the Student.

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy”

⁴ 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 (4th Cir. 1997).

or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. 176. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or upon receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. See *In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Nor is educational benefit measured solely by academic achievement. Behavioral progress and the acquisition of appropriate social skills are also part of educational benefit. See *Venus Independent School District v. Daniel S.*, 2002 WL 550455 (N.D. Tex. 2002).

At all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect. *Rowley*, 458 U.S. at 206. Once educational authorities have made a professional judgment about the substantive content of a child’s IEP, that judgment must be respected. *Tice v. Botetourt*, 908 F.2d 1200, 1208 (4th Cir. 1990). The required deference to the opinions of the professional educators, however, does not relieve the administrative law judge of the obligation to determine as a factual matter whether a given IEP is appropriate. *County Sch. Bd. Of Henrico County, Va. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005).

Contentions of the Parties

There is no dispute between the parties as to the goals and objectives provided in the February 21, 2012 IEP. All agree that they are appropriate. Nor is there any dispute as to the fact that the Student has made significant academic progress during at least the last two academic

years. That progress is reflected in test scores from both private and MCPS testing. The concern expressed by the Parents is that the Student has become overly dependent on adult support and is not developing as an independent learner. While they agree that she continues to need the supports provided for in her IEP, including the one-on-one aide, the scribe and the reader, they feel she is unable to use the skills she has been developing in an independent environment and that, rather than progressing toward independence, she is becoming more dependent on adults and less able to interact with age peers.

The proper means to address these concerns, the Parents contend, is by placing the Student in a small group setting for all of her academic instruction, so that she can receive intensive instruction in independent learning skills. They contend that, by building her independence, she will also gain confidence that will increase her self-esteem and aid in her peer social interaction.

MCPS counters that the Student has made consistent educational progress and that she would lose the benefit of exposure to non-disabled peers if placed in the very restrictive environment her parents seek. They point out that the only way to achieve the three- or four-to-one student/ teacher ratio the Parents propose would be to place the Student in a self-contained special education program, with no interaction with non-disabled peers in any of her academic subjects. Based upon her achievement to date, such a restrictive placement, they contend, is unwarranted.

The Evidence

The Parents' Case

XXXX XXXX, an expert in special education, who evaluated the Student at the Parents' request, testified regarding her testing and her classroom observation of the Student in May

2011. Her test results confirmed the findings on testing by MCPS a few months earlier, that the Student was making educational progress. Ms. XXXX also found, however, on the reading test she administered, that although the Student was able to read with 90-95% accuracy, she had significant weakness in comprehension and was well below grade level in comprehension. Ms. XXXX also testified that, in class, the Student appeared to be completely dependent on her aide and was unable to respond independently to the lesson being presented. Additionally, the Student did not interact with other students, even when other students were talking amongst themselves.

Ms. XXXX opined that the Student needed a small instructional setting, no more than three to five students per instructor, in order to learn to generalize the skills she was acquiring and develop intellectual independence. She was quite emphatic in her opinion that it made no difference whether the students in the group were disabled or non-disabled and felt that a self-contained educational setting for all academic subjects was the proper placement for the Student.

While MCPS disputed the completeness and accuracy of Ms. XXXX's observations, I found her to be a generally competent and coherent witness. Her observations and testing, however, were over a year old and account progress made during the Student's fourth grade year. Ms. XXXX made no effort to update her observations, other than reviewing work samples. She did not talk to the Student's teachers and her only contacts with the Student herself were the brief encounters in May 2011.

Dr. XXXX XXXX also testified for the Parents. She is a private school psychologist and has assisted the Parents in their quest for services for the Student. She works with the group that tested the Student in March 2010. She had virtually no personal interaction with the Student, but did observe her in class for seventy minutes in February 2012. The lesson involved a multi-step

project that had been started previously. The project involved creating a virtual “wax museum” in which each student acted out an historical personage when prompted to do so by another person pressing a virtual “button” on the student’s shirt. The teacher explained to the class as a whole, with the help of an overhead projector, what he intended to do that day. It was not a typical day because several members of the class were going to be pulled out, some going to music class and some going to testing, and the day’s activities were modified accordingly.

After explaining how the day would proceed, the teacher took the Student and two others into a small reading group. After the reading group, the children went back to their desks to work independently. Dr. XXXX observed the Student to be very involved in the lesson in the reading group. The Student looked organized, appeared to know what to do and participated in the discussion. When the Student went back to her desk, according to Dr. XXXX, she was not focused, did not do independent work and her written output did not match the assignment.

Dr. XXXX praised the Student’s fourth grade teacher, XXXX XXXX, as gifted and said that, although he was not a special educator, he was a talented teacher who could implement the special education curriculum. Nonetheless, her opinion was that the Student should be in a small group setting for all instruction, with children with similar disabilities and a special educator who could address their disabilities.

Although Dr. XXXX did not test the Student herself, she relied on the testing and evaluation done by her colleague in 2010. She explained that the Student has multiple disabilities, and while she can acquire individual, isolated skills, her dyspraxia and executive function disorder affect her fluency, her ability to sequence consistently, to process language and to integrate skills and information. Dr. XXXX gave a very lucid and detailed account of the

Student's disabilities to support her conclusion that the Student needs intensive support, with much repetition in order to succeed and continue to develop intellectually and academically.

The Student's Mother testified as to the Student's developmental history and her current educational status. The Mother agreed heartily with Dr. XXXX's appraisal of the Student's fourth grade teacher, and the record includes numerous communications with Mr. XXXX, expressing gratitude and praise for the accomplishments he has fostered. One email was an exuberant appreciation of the "wax museum" presentation to the parents.

The Mother expressed her grave concern that the Student was exhibiting a "learned helplessness" and was not developing independence that would allow her to succeed as she matures. She referred to the opinion of the psychologist who had tested the Student in 2010 that, without an intensive program, the Student would be lost and helpless by the time she got to middle school.

The Mother had expressed this concern before the Student entered the third grade, but was persuaded to accept the placement in the [PROGRAM] program because she understood that program involved small classes with intensive special education instruction. The program that the Student is now attending does not fit that description (her fourth grade class included about 22 students). The Mother feels that the Student is not independent; she follows directions if they are repeated, but is very slow.

The Mother's concerns include the Student's lack of social skills. The Student has only one friend and does not interact with peers unless they approach her; when they do, she responds inappropriately and uses the wrong tense, hindering interaction. The Father also testified that he did not see progress when working with the Student on schoolwork at home.

The Student has not been assigned homework over the past year, apparently because she has been working with an “education therapist” for an hour three times a week. There was very little information about the therapy she received, except that utilized a program known as Orton-Gillingham, which is a reading and writing program with an emphasis on phonetics. The qualifications of the therapist were not described and the therapist did not testify. The therapist’s for the period January through June 2012, admitted in evidence reports “steady, measurable gains in all aspects of academic therapy,” and states that she is becoming more confident in her abilities” There was no effort to relate the one-on-one therapy experience to the Parents’ contention that the Student requires small group teaching for all academics in order to make meaningful progress.

MCPS’s Case

MCPS presented the testimony of XXXX XXXX, the special education supervisor for a number of schools including [School 2]; XXXX XXXX, the resource teacher at [School 2]; XXXX XXXX, the school psychologist; and XXXX XXXX, the Student’s fourth grade teacher.

Mr. XXXX principally described the process by which the current IEP was developed. He explained that, at first, there was some question about placing the Student in the [PROGRAM] program because she was much more capable than the [PROGRAM] profile and would be higher functioning than other students in the program. Once the placement was made, the feedback he received was that the Student was doing well. He explained that the [PROGRAM] program evolves depending upon the needs of the students enrolled. Therefore, the structure of the program has changed between the time the Student arrived and now. There are ten students, at most, in the program. He felt the [PROGRAM] program addressed the Student’s needs as identified in her 2010 evaluation.

Mr. XXXX was present during the observation by Ms. XXXX in May 2011. He differed with her on her observations in several respects. As discussed above, however, that observation was over a year ago and does not take account of progress during the fourth grade. During that year, Mr. XXXX testified, the Student made significant progress in all areas including social skills. He said she still needed a high level of support for fluency and output and that her IEP provides for the LRE with flexibility for smaller student/teacher ratios when appropriate. His involvement in the Student's education has been in a supervisory capacity, in which he monitors her progress; he is not directly engaged in her education.

XXXX XXXX has been involved with the Student's education since the 2008-2009 school year. In 2010, he reviewed the Student's outside testing for technical accuracy and to determine if the results of the private evaluation were consistent with her school performance. He generally agreed with the opinions of the private evaluator, and stated that his most noteworthy observation was that the Student was not interacting with any of her peers.

As to the Student's cognitive ability, he summarized that she is of low average to average ability. Generally, such a child should be able to perform within or close to the average range. Because of her complex disabilities, however, he would not expect this Student to perform at the average range in all areas. Nonetheless, the WJ III test results indicate that the Student has achieved significant growth between the years that test was administered and has learned new skills and maintained skills. She has made particularly significant progress in writing samples where her score in 2010 was 71 and in the two 2011 tests was 91 and 93, respectively. Mr. XXXX characterized this as "very significant . . . over a standard deviation in growth." Tr. at 420.

XXXX XXXX testified to her work with the Student from the time the Student arrived at [School 2]. She was the Student's case manager and self-contained reading teacher through the third grade. She worked with the Student's special education teachers, general education teacher and aides, and was generally responsible for facilitating coordination of the team. She did not teach the Student in the fourth grade, but continued to monitor her program.

Ms. XXXX described the Student as lovely, sweet, respectful and a joy to teach. She found the Student a little shy, but once the Student became more comfortable with her and the new school, Ms. XXXX said she could reach her. The Student's speech was immature, a bit silly, but Ms. XXXX could understand her.

In reading, Ms. XXXX said the Student had some fluency problems and decoding errors, but if questioned, she repeated properly. At the beginning of the third grade, she was reading one year below grade level; by the end she was about a half-year below. In writing, the Student had greater need. She was writing one sentence at a time, and should have been able to write two-to-three-sentence paragraphs. In math, the team felt she was on grade level. She understood the concepts, but did have some confusion with computation, adding and subtracting.

Ms. XXXX described an observation she performed on March 22, 2011, during the second half of the third grade. Ms. XXXX observed some inattentiveness and that the Student needed some prompting, but also noted that the Student completed her work and raised her hand several times to respond to questions, without prompting from an adult. The Student was called upon once and gave a correct answer during the half-hour observation.

It was Ms. XXXX's opinion, based upon data including the Fountas and Pinnell informal reading inventory and the Maryland State Assessment (MSA) tests, that the Student was performing at grade level in both math and reading. Ms. XXXX also testified that the tests

(including the reading test) were read to the Student by a reader, in accordance with the accommodations provided for in her IEP.

While Ms. XXXX recognized that the Student needed prompting in the general education classroom, she said the Student did not need adult assistance for the entire lesson. It was her belief that the Student's work product was her own, and that the Student had demonstrated proficiency and growth in the general education classroom. It was also her opinion that the Student was exhibiting independence, although she continued to need prompts in the fourth grade. Upon cross-examination, she agreed that the grading for independence on the Student's report card took into account the support provided for in the Student's IEP. Therefore, although the report card for the end of fourth grade indicates that the Student is independent in all areas except returning completed homework (for which the report card indicates limited prompts), the Student continued to be inattentive at times and needed prompting to focus and to compete work on her own. She continues to have needs in organization, attention to task, and responding to visual and verbal prompts.

It was Ms. XXXX's opinion that the Student did not need a more restrictive environment for reading. She felt that the Student flourished in reading throughout the year and that she needed to be with her peer group, which was her general education classroom, as much as possible. She agreed, on cross-examination, that her reasons for rejecting a more restrictive environment were that, in the general education setting, the Student was becoming more social with her classmates, becoming more independent and learning more on her own. When asked about whether she knew if the Student sees any of her classmates outside of school, she said she did not know, but would assume not because her classmates did not live in the same

neighborhood. She also testified that smaller classes for all academic subjects, as the Parents requested, was available at [School 2] if that was what the Student needed.

The final MCPS witness was the Student's fourth grade teacher, XXXX XXXX. Mr. XXXX described the Student's progress over the last school year. He said that she is a shy person who, at the beginning of the year, frequently appeared not to pay attention during large-group sessions. As the year progressed, however, she became more engaged and attentive. She likes stories and enjoys humor. Early in the year, she would offer inappropriate or non-sensical comments, and giggle inappropriately, which Mr. XXXX interpreted as a way of dispelling anxiety or nervousness. This behavior was replaced later by appropriate jokes and laughter, accompanied by diminished evidence of anxiety.

Similarly, Mr. XXXX observed that her interaction with peers increased as she participated more in class. He said he had focused on more class participation during the second half of the year. As a result, the Student started raising her hand, offering on-topic answers that made sense. This, in turn, led to greater respect and response by her classmates and more interaction. She also interacted with her classmates in partner work. Although Mr. XXXX acknowledged that the Student's social interaction was not at a level one would expect in a child of her age, his observations reflected significant progress.

According to Mr. XXXX, the Student also developed increased confidence and independence in her academic work in general and in writing in particular. As the year progressed she was increasingly able to complete writing assignments without adult assistance.

Mr. XXXX described the Student's participation in the "wax museum" project. The students were to pick an historical figure, do research about the person, gather information in a graphic organizer, make an outline to write a speech about that person, revise the speech, then

memorize the speech and give it, first in front of the class, then to other students and parents who came up and pressed a “button” on the presenter’s shirt. The presentation was made first to the class, then to other students at [School 2], and then to students and parents in the cafeteria at [School 3]. It was the writing part of the wax museum project that was underway during Dr. XXXX’s observation.

The Student chose XXXX XXXX as her character. She not only wrote and presented a speech, but included singing in her presentation. Mr. XXXX felt that the classroom presentation was the most challenging because it was to an audience of about twenty peers. In the other settings, there may have been more people around, but the actual performance was for the individual who pressed the “button.” Mr. XXXX believed that the Student gained confidence and motivation from the experience and was more motivated, more confident and more engaged after that project. The presentation occurred in March 2012.

Mr. XXXX taught the Student reading, writing, math, science and social studies. In addition, the Student received resource support from a special education teacher in reading and math. He felt that the Student showed considerable growth in reading; that she learned to make on-point comments and personal connections about what she read that was superior to what she was able to articulate at the beginning of the year. He also pointed to the substantial increase in her MAP-R score over the year, and testified that the special education reading teacher reported similar progress. He said the Student was reading on grade level. As to writing, by the end of the year he said the Student was able to write a five-sentence story, on her own, with a beginning, middle and end. In math, he said the Student showed the type of growth you would expect in the fourth grade. He said the resource teacher reported that the Student was working on math independently.

Mr. XXXX also described working with the Student in small groups for reading and writing, as well in the larger classroom setting. He said that at the beginning of the year there was a big difference between the Student's performance in small groups and her ability to access what was going on in the larger setting. As the year went on, she was paying attention and was more engaged during the whole-class activity. While there was still a difference in her ability to access instruction in the small, as opposed to the large group setting, that difference had diminished greatly. He did not feel that, by the end of the year, the Student required small group instruction in order to learn.

Mr. XXXX pointed out that, when a student is pulled out of class for individualized instruction, the student misses class activities. For example, he explained that, at the beginning of the every day, he conducts a morning meeting with the class. During that time, the students share some experience that is important to them and others ask questions. This is a significant social skills activity. When the Student was pulled out for special education during morning meeting, she missed that activity, which was a particular loss for her, considering her social skills needs. When her schedule was changed so that she could participate in morning meeting, she shared experiences like going to the movies, going to an amusement park, and that she had a planned play date with a friend. He felt that morning meeting was a particularly useful and happy experience for the Student.

Mr. XXXX participated in the IEP meeting that reduced the Student's pull-out special education hours from ten to five, and agreed with that decision. He felt that she had made progress, gained independence and was better at accessing the general curriculum in a large group, and he was concerned that she was missing out on instruction and the opportunity to interact with the full class when she was pulled out of class.

Analysis

Motion for Judgment

At the close of the Parents' case, MCPS made a Motion for Judgment. Under the OAH Rules of Procedure, a party may move for judgment at the close of the evidence offered by an opposing party, as provided in COMAR 28.02.01.12E:

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.*

I declined to render judgment until the close of all evidence. At this time I will deny the Motion. I found the Student's Mother to be sincere in her concerns for her daughter's educational development, and without further evidence, I had no reason to reject her testimony about lack of independent progress and an inappropriate reliance on adult support. I also found

Ms. XXXX to be a competent and credible witness, and although her evaluation of the Student was more than a year old, many of her observations were corroborated by Dr. XXXX's classroom observation a year later. As noted above, the fact that the Student had shown progress on academic testing is not dispositive of whether she is receiving an appropriate education. If the evidence supported the conclusion that she was becoming more dependent on external support, and was therefore being hindered, rather than helped, by the type of educational setting provided, I might well have concluded that she was not receiving FAPE. Therefore, I find that the evidence was sufficient to withstand the motion for judgment.

The Merits

My conclusion, however, after hearing and analyzing all of the evidence, is that the Student is receiving FAPE under her current IEP. I rely most heavily on the testimony of Mr. XXXX. As the Student's fourth grade teacher, he was the educator with the most consistent and intensive interaction with the Student over the course of her last school year. As a professional educator, his opinion is entitled to deference. *Rowley*, 458 U.S. at 206; *Tice v. Botetourt*, 908 F.2d at 1208 . The parties vied with each other in choosing the correct superlative to describe this teacher. There is every reason to believe that his observations and opinions as to the Student's performance in class are reliable.

Mr. XXXX described a student who was growing steadily in his class. Her academic performance was proceeding appropriately, and, in addition, she was becoming increasingly involved and engaged in her classwork. As her participation in class increased, the responses of her classmates became more favorable. I do not discount the Student's Mother's testimony that the Student has few friends. What I take from Mr. XXXX's testimony is that the environment for making friends and for developing appropriate peer interaction has improved over the course

of the year. I cannot see how taking the Student out of class for all of her academic subjects will enhance her ability to make friends and to interact appropriately with her peers. While she may receive more intensive attention to social skills, she will have limited ability to practice those skills if her educational environment is limited to three or four children with similar disabilities. The less time she spends in the company of her classmates, the more difficult it will be for her to forge social relationships.

As to academic progress, there is no dispute that the Student has shown steady progress on standardized testing. Again, I do not discount Ms. XXXX's opinion that testing measures discrete skills, but is not as useful in measuring integration. I also am not convinced that the Student is really reading at grade level. The MSA was read to her. While it may indicate levels of comprehension of oral material, it does not measure her ability to read and understand by herself. The MAP-R result is more persuasive because she took that test on her own, with no assistance. According to Mr. XXXX, however, 200 was a target score for third grade on the MAP-R. The Student's fourth grade score was 198. What is apparent, nonetheless, is that the Student has made steady, meaningful progress on all standardized tests, and the rate of progress on the MAP-R from the end of the third grade to the end of the fourth grade, eleven points, was more than what is expected over the course of a year. Therefore, the rate of progress is meaningful.

As to independence, as noted, Ms. XXXX's observation does not account for progress over the last year. While Dr. XXXX observed similar behavior in March 2012, I do not find that her single observation for seventy minutes is more reliable than Mr. XXXX's assessment based upon a year's worth of educational interaction. Additionally, as Mr. XXXX explained, the lesson Dr. XXXX observed was atypical. Mr. XXXXX stated that he modified his lesson to

account for the fact that he was missing a significant portion of the class, doing more work with groups than with the class as a whole. As a result, the Student may have lacked the support he normally would have afforded her during a full-class lesson. I also do not find it probable that the Student would have performed as well as she did on testing or on the classwork described by Mr. XXXX if she were regularly “lost” during large-group instruction.

As to the Parents’ observations that the Student displayed a lack of independence and a level of helplessness when they attempted to assist her with homework, it is not unusual for children of all abilities to behave differently with their parents than with their teachers. I do not question their observations, but I do question the applicability of those observations to school performance. I also note that the Student was not doing homework over the last year, so the Parents had less involvement in her specific academic activities.

Finally, I question the efficacy of placing the Student in a small group for all academic instruction as a means to improve her academic independence. I understand the need for small group instruction when a child is not gaining benefit from large group instruction, and I respect the judgment of Ms. XXXX that the Student needed that level of support in 2011. The evidence, however, is that her instruction in the general education setting includes small group sessions in reading, writing and math. In addition, she receives pull-out reinforcement from a special educator. The strong evidence, both from test scores and from the observations of her fourth grade teachers, is that the Student is learning in the general classroom.

While there was much testimony that progress over the past year may be attributed to the fact that Mr. XXXX is an extraordinary teacher (and the inference is that this may not be the case next year), if the Student does not continue to progress, there will be opportunity to adjust both

her IEP and the method by which it is implemented. The evidence at this point, however, is that the IEP, which has been in effect since last February, is providing the Student with a FAPE.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Parents have failed to establish that the Student's February 2012 IEP implemented by Montgomery County Public Schools is not reasonably calculated to offer the Student educational benefit. 20 U.S.C.A. §§ 1400- 1487 (2010); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

ORDER

I **ORDER** that the Parents' request to have the Student placed in small classes for all of her academic subjects is **DENIED**.

August 20, 2012
Date Decision Mailed

NEP/kkc

Nancy E. Paige
Administrative Law Judge

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final review 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 OAH 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.